Vanguard Fire & Supply Co., Inc. d/b/a Vanguard Fire & Security Systems *and* Road Sprinkler Fitters Local Union No. 669, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO. Cases 7–CA–45823, 7–CA–46478, and 7–CA–46727

September 30, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On September 30, 2004, Administrative Law Judge Keltner W. Locke issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Union each filed an answering brief and cross-exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs, and has decided to adopt the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

A. Background

Vanguard Fire & Supply Co., Inc. d/b/a Vanguard Fire & Security Systems, the Respondent, supplies and maintains fire and rescue equipment. It operates facilities throughout Michigan. On July 26, 2001, Road Sprinkler Fitters Local Union No. 669 (the Union) was certified as the representative of employees in the following unit:

> All full-time and regular part-time employees engaged in the installation and service of fire protection sprinkler pipe and chemical system pipe employed by the Respondent at, or based at, 2101 Martindale S.W. Grand Rapids, Michigan, but excluding alarm technicians, employees engaged in the sale, installation and service of portable chemical extinguishers, office clerical employees, and guards, professional employees and supervisors as defined in the Act.

Bargaining then began for an initial contract. On June 5, 2002, the parties entered into an informal settlement agreement[1] that modified the description of the unit, as follows:

> The bargaining unit work shall consist of the installation and repair of fire sprinkler systems without geographic limitation, and restaurant systems of the type performed by Marty Shields, but shall not include the installation and repair of any other chemical or gas special hazard systems, and shall not include the visual inspection and related testing of any systems. Marty Shields shall remain a member of the bargaining unit.

After receiving a petition signed by eight employees stating, "[W]e don't want 669 representation," the Respondent withdrew recognition from the Union on October 15, 2003.

B. Philip Moss' Starting Wage and Vacation Accrual Rates

The Respondent admits that it unilaterally implemented new starting wage and vacation accrual rates for employee Philip Moss on July 8, 2002,[2] but asserts a defense based on Section 10(b) of the Act. The initial charge in the case, which contained an allegation regarding unilateral starting wage rates, was filed on January 17, 2003. Because this was more than 6 months after Moss' July 8 starting date, the judge found that this allegation was barred by Section 10(b). We disagree.

The General Counsel argues that the Union did not know of Moss' starting wage rate until mid-September 2002. Union organizer Jim Tucker testified that he became aware of Moss' wage rate when the Respondent attached a document listing starting wage rates to a packet of information given to the Union in mid-September 2002 pursuant to an information request. Tucker further testified that the Union did not know about Moss' vacation accrual rate until October or November 2002, when a supervisor told Tucker about it.

The Board has held that the 10(b) limitations period does not begin to run until the aggrieved party has received actual or constructive notice of the conduct that constitutes the alleged unfair labor practice. *Concourse Nursing Home*, 328 NLRB 692, 694 (1999). When a union is on notice of facts that would reasonably engender suspicion of an unfair labor practice, the 10(b) period will begin to run. See *Transit Union Local 1433 (Phoenix Transit System)*, 335 NLRB 1263 fn. 2 (2001). The party asserting the 10(b) defense has the burden of showing actual or constructive notice. *Courier-Journal*, 342 NLRB No. 113, slip op. at 11 (2004). Here, we find that the Respondent has not met this burden.

The credited testimony establishes that the Union did not become aware of Moss' starting wage rate until mid-September 2002, and did not become aware of his vaca-

[1] This agreement settled unfair labor practice allegations in Cases 7–CA–44437, 7–CA–44872, and 7–CA–44750.

[2] The parties stipulated that Philip Moss was in the unit.

tion accrual rate until October or November of that year. Because those rates were unilaterally established by the Respondent without consultation with the Union, there is little or no reason to find that the Union should have known about them prior to the information request. In similar circumstances the Board has held that, where employees given wage increases have not informed a union of their raises, and there is no other sign of open or obvious action that would have put the union on notice, constructive knowledge of the increases will not be imputed. *Broadway Volkswagen*, 342 NLRB No. 128, slip op. at 4 (2004).

We conclude that there was no constructive knowledge here. Particularly because the result of the change was a higher starting wage rate and a better vacation accrual rate for employee Moss, it is not surprising that Moss would not report this favorable change to the Union. Also, it is not unreasonable that the Union would not uncover this "change" between July 8 and 17 (the start of the 10(b) period).

Because the charge was filed on January 17, 2003, which is less than 6 months after the Union learned of the Respondent's actions, we find the charge timely. As the Respondent has admitted the facts underlying this allegation, we reverse the judge, and find that the Respondent violated Section 8(a)(5) when it unilaterally implemented starting wage and vacation accrual rates for Philip Moss.

C. Change in Implementation of Cellular Phone Policy

Prior to December 2001, the Respondent began furnishing cellular phones to certain employees, paying Nextel for a specified number of monthly minutes for each phone. The Respondent's written policy was to bill employees for any charges over their allotted monthly minutes. The record shows, however, and the judge found, that until December 5, 2002, employees were not billed for any such overage charges made to their phones. After this date, the Respondent began billing employees for overages.

The judge concluded that the change in the Respondent's implementation of the cell phone policy violated Section 8(a)(5) of the Act. We agree. Although the Respondent's written policy on cell phone use did not change, the way in which the policy was implemented did change. The Board has held that a change from lax enforcement of a policy to more stringent enforcement is a matter that must be bargained over. See *Hyatt Regency Memphis*, 296 NLRB 259, 263–264 (1989), enfd. sub nom.in relevant part *Hyatt Corp. v. NLRB*, 939 F.2d 361 (6th Cir. 1991). We therefore find that the Respondent's change in implementation of the cell phone policy without bargaining violated Section 8(a)(5).[3]

D. Request for a Bargaining Agenda

The Respondent sent a letter to the Union on July 16, 2003, in response to the Union's offer to put some proposals it had previously rejected back on the table. This letter insisted that the Union provide "a detailed agenda" of topics the Union wished to discuss and proposals the Union wished to introduce before the next meeting.[4]

The Union responded by a letter that included a list of issues the Union wished to discuss at the meeting. The Respondent's attorney replied on August 12, stating that the Union had not provided the detailed agenda "comprised of the four points specified in my letter" of July 16, and, therefore, that the Respondent would refuse to meet with the Union. The Union again attempted to satisfy the Respondent's demands by letter of August 28, listing specific contract proposals the Union wished to discuss, along with other issues it wished to clarify. Nevertheless, the Respondent continued to refuse to meet with the Union. The Respondent has admitted that it conditioned meeting upon advance written submission by the Union of a detailed agenda and proposals.

The judge found that a bargaining agenda was a nonmandatory subject of bargaining and that the Respondent had no right to insist upon an agenda as a precondition to bargaining. Accordingly, he found that this conduct violated Section 8(a)(5) of the Act. We agree. Further, even assuming, arguendo, that the Respondent had the right to request a bargaining agenda from the Union prior to meeting, we find that the Union satisfied that request.[5]

---

[3] Member Schaumber concurs that the evidence is sufficient to sustain the judge's finding of a unilateral change in the Respondent's enforcement of its cell phone policy. However, he notes that had the evidence established that prior lax administration of the policy was due to administrative error or incompetence, he would find that the Respondent was privileged, without bargaining, to take steps to ensure the extant policy was properly followed.

[4] In its letter the Respondent demanded that the Union's agenda address the following four issues:

> 1. Each and every detail of our proposals which you believe needs to be "worked out." 2. You claim that there is some "remainder of the contract which we need to work out." On page 2 of your letter you itemize eight new proposals you intend to make. Again, I believe raising new proposals at this late stage is evidence of bad faith bargaining. However, if you really intend to raise new issues, please include the specific proposals with your agenda. 3. You state that there are "some other issues which [you] have not had a chance to discuss." The agenda should include a detailed listing of every other issue that you would like to discuss. 4. You also indicate that you think you need more information. Please provide us a written request for the items and information you think you need.

[5] Member Schaumber agrees, on the specific facts of this case, that the Respondent's conduct constituted bad-faith bargaining. However, in his view, there may be circumstances where a party's insistence on

In fact, the Union bent over backwards to accommodate the Respondent's desires, sending two detailed letters to the Respondent discussing its bargaining proposal and including an agenda of issues the Union wished to discuss. The Respondent rejected both of those attempts as unsatisfactory, and continued to refuse to bargain with the Union. This conduct constitutes bad-faith bargaining, and, thus, violates Section 8(a)(5).

E. Withdrawal of Recognition

The Respondent admits that it withdrew recognition from the Union on October 15, 2003.[6] The Respondent based its withdrawal on a petition signed by eight of its employees. Four of the signers, however, were Austin Aamodt, Nathan Sloan, Sean Wiggers, and Evan Timmerman, who, the General Counsel argued, and the judge correctly found, were not in the bargaining unit at the time recognition was withdrawn.[7] (Indeed, Sloan, Wiggers, and Timmerman were never in the bargaining unit.)[8] This leaves a unit of 11 employees, only 4 of whom signed the petition. As the petition did not demonstrate a loss of majority support for the Union, the Respondent's withdrawal of recognition based on this petition violated Section 8(a)(5).[9]

ORDER

The National Labor Relations Board orders that the Respondent, Vanguard Fire & Supply Co., Inc. d/b/a Vanguard Fire & Security Systems, Grand Rapids, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition from the Union on the basis of a petition signed by less than a majority of the bargaining unit employees.

(b) Making material, substantial, and significant changes in the implementation of policies without first notifying the Union and affording it an opportunity to bargain concerning such changes and their effects.

(c) Unilaterally conferring wage and vacation accrual rates on certain bargaining unit employees without first notifying the Union and giving it the opportunity to bargain.

(d) Failing and refusing to furnish the Union with requested information relevant to the Union's duties as exclusive bargaining representative and necessary for that purpose.

(e) Setting preconditions to meeting and negotiating with the Union as the exclusive representative of the bargaining unit employees.

---

an agenda as a precondition to further bargaining might be appropriate and lawful.

[6] We correct the judge's inadvertent error, on p. 12, L. 27 of his decision, that the withdrawal of recognition occurred on October 15, 2004, noting that the record shows, and the Respondent admits that the withdrawal of recognition occurred on October 15, 2003.

[7] No party has argued that Aamodt was eligible by virtue of having a reasonable expectation of recall to the unit.

Chairman Battista notes that under current Board law as set out in *Harold J. Becker Co.,* 343 NLRB No. 11 (2004), the burden of proving that employees explicitly excluded from a bargaining unit are nevertheless included in that unit due to their dual-function status rests with the party asserting dual-function status. Chairman Battista dissented from *Becker*, and adheres to the views expressed in his dissent. However, for institutional reasons, he agrees with the decision to exclude Aamodt from the unit.

Member Schaumber does not pass on the judge's finding that Aamodt should be excluded from the unit. He agrees that there is sufficient evidence to sustain the judge's findings with respect to employees Wiggers and Timmerman (regardless of which party bears the burden of proof), rendering moot the issue of Aamodt's status. Even if Aamodt were included in the unit, the petition upon which the Respondent's withdrawal of recognition was based was not signed by a majority of the bargaining unit employees. Member Schaumber notes that the burden of proof rule of *Harold J. Becker Co.*, supra, applies only where the employee is in a classification specifically excluded by a stipulated unit agreement. There was no dispute in *Becker* that the challenged employees occupied such excluded classifications. Here, by contrast, the classification is disputed, and it is Aamodt's recall letter—not the Stipulated Election Agreement—that is the asserted basis for triggering the *Becker* rule. In fact, the informal settlement agreement that amended the certified unit describes the unit in terms of bargaining work ("the installation and service of fire protection sprinkler pipe"). Since there is no dispute that Aamodt performed such bargaining work after recall, the burden should have been on the General Counsel to show that Aamodt was not eligible because he did not perform *enough* bargaining unit work to qualify for inclusion in the unit.

[8] Because Sloan, Wiggers, and Timmerman were never in the unit, we affirm the judge's finding that the unilateral wage increases given to those employees did not violate Sec. 8(a)(5).

Member Schaumber also does not pass on the judge's finding that Sloan should be excluded from the unit. Like Aamodt, Sloan's inclusion in the unit would not alter the fact that the petition was not signed by a majority of the bargaining unit employees. Member Schaumber concurs in finding no violation with respect to Sloan's unilateral increase because that allegation of the complaint would be properly dismissed on procedural grounds.

[9] In light of this disposition, we need not consider whether the petition was tainted by the Respondent's other unfair labor practices.

We note that the judge analyzed the need for an affirmative bargaining order under the criteria set forth by the U.S. Court of Appeals for the District of Columbia Circuit. We adopt the judge's analysis of this issue, and agree that the requirements of the court for an affirmative bargaining order have been met in this case. Member Liebman respectfully disagrees, however, with the court's requirements, and adheres to extant Board precedent, pursuant to which an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." *Caterair International,* 322 NLRB 64, 68 (1996).

Chairman Battista and Member Schaumber did not participate in *Caterair* and agree with the D.C. Circuit that a case-by-case analysis is required to determine whether an affirmative bargaining order is appropriate. See, e.g., *Flying Foods*, 345 NLRB No. 10, slip op. at 10, fn. 23 (2005). They recognize, however, that the view expressed in *Caterair* represents extant Board law.

(f) Canceling meetings with the Union because the Union did not comply with the preconditions unilaterally imposed by the Respondent.

(g) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize the Union as the exclusive bargaining representative of the employees in the bargaining unit certified by the Board on July 26, 2001, as modified by the June 5, 2002 agreement settling unfair labor practice allegations in Cases 7–CA–44437, 7–CA–44872, and 7–CA–44750.

(b)Within 14 days from the date of this Order, rescind the unlawful change in implementation of its cell phone reimbursement policy.

(c) Make whole, with interest, all employees adversely affected by the unlawful change in implementation of its cell phone reimbursement policy.

(d) If requested to do so by the Union, rescind the wage and vacation accrual rates the Respondent unilaterally conferred on certain bargaining unit employees without first notifying the Union and giving it the opportunity to bargain.

(e) Within 14 days from the date of this Order, furnish the Union with requested information concerning what jobs have been awarded to the Respondent and the approximate starting dates of those jobs.

(f) Meet and bargain with the Union, in accordance with its obligations defined in Section 8(d) of the Act, without setting or insisting upon any preconditions to such meetings.

(g) Within 14 days after service by the Region, post at its facilities in Grand Rapids, Michigan, copies of the attached notice marked "Appendix.[10] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 8, 2002.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the consolidated complaint is dismissed insofar as it alleges violations not found.

Dated, Washington, D.C. September 30, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT withdraw recognition from the Union on the basis of a petition signed by less than a majority of the bargaining unit employees.

WE WILL NOT make material, substantial, and significant changes in the implementation of policies without first notifying the union and affording it an opportunity to bargain concerning such changes and their effects.

[10] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT unilaterally confer wage and vacation accrual rates on certain bargaining unit employees without first notifying the Union and giving it the opportunity to bargain.

WE WILL NOT fail or refuse to furnish the Union with requested information relevant to the Union's duties as exclusive bargaining representative and necessary for that purpose.

WE WILL NOT set preconditions to meeting and negotiating with the Union as the exclusive representative of the bargaining unit employees.

WE WILL NOT cancel meetings with the Union because the Union did not comply with the preconditions unilaterally imposed by us.

WE WILL NOT, in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed you by Section 7 of the Act..

WE WILL recognize the Union as the exclusive bargaining representative of our employees in the bargaining unit certified by the Board on July 26, 2001, as modified by the June 5, 2002 agreement settling unfair labor practice allegations in Cases 7–CA–44437, 7–CA–44872, and 7–CA–44750.

WE WILL, within 14 days from the date of this Order, rescind the unlawful change in implementation of our cell phone reimbursement policy.

WE WILL, make whole, with interest, all employees adversely affected by the unlawful changes in implementation of our cell phone reimbursement policy.

WE WILL, if requested to do so by the Union, rescind the wage and vacation accrual rates we unilaterally conferred on certain bargaining unit employees without first notifying the Union and giving it the opportunity to bargain.

WE WILL, within 14 days from the date of this Order, furnish the Union with requested information concerning what jobs have been awarded to us and the approximate starting dates of those jobs.

WE WILL meet and bargain with the Union, in accordance with our obligations defined in Section 8(d) of the Act, without setting or insisting on any preconditions to such meetings.

VANGUARD FIRE & SUPPLY CO., INC. D/B/A VANGUARD FIRE & SECURITY SYSTEMS

Erikson C. N. Karmol, Esq., for the General Counsel.
Timothy J. Ryan, Esq. and *Michael E. Stroster, Esq. (Miller, Johnson, Snell & Cummiskey, P.L.C.),* of Grand Rapids, Michigan for the Respondent.
Jason J. Valtos, Esq. (Osborne Law Offices), of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF CASES

KELTNER W. LOCKE, Administrative Law Judge. In this case, the Government alleges that the Respondent, Vanguard Fire & Supply Co., Inc., doing business as Vanguard Fire & Security Systems, failed and refused to bargain in good faith with the Union, Road Sprinkler Fitters Local Union No. 669, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO, by engaging in several kinds of conduct which violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). For the reasons discussed below, I find that Respondent made certain unlawful unilateral changes in terms and conditions of employment of bargaining unit members, failed and refused to furnish the Union with requested information, refused to meet and negotiate unless the Union agreed to terms which were nonmandatory subjects of bargaining, and then impermissibly withdrew recognition from the Union. All of these actions constitute unfair labor practices which Respondent must remedy.

A. Procedural History

This case began on January 17, 2003, when Road Sprinkler Fitters Local Union No. 669, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (the Union or the Charging Party) filed the initial charge against Respondent in Case 7–CA–45823. The Union amended this charge on February 10 and March 26, 2003.

On August 6, 2003, the Union filed its initial charge against Respondent in Case 7–CA–46478. The Union amended this charge on September 16, 2003.

On October 16, 2003, the Union filed a charge against Respondent in Case 7–CA–46727.

The General Counsel, by the Regional Director for Region 7 of the National Labor Relations Board (the Board), issued a complaint and notice of hearing in Case 7–CA–45823 on March 27, 2003. On November 26, 2003, the Regional Director issued an Order consolidating cases, amended consolidated complaint and notice of hearing in Cases 7–CA–45823 and 7–CA–46478.

On December 24, 2003, the Regional Director issued a second Order consolidating cases, second amended consolidated complaint and notice of hearing in Cases 7–CA–45823, 7–CA–46478, and 7–CA–46727. For brevity, I will refer to this pleading simply as the "complaint."

Respondent filed timely answers.

On March 16, 2004, hearing opened before me in Grand Rapids, Michigan. The parties presented evidence on March 16 through 19, 2004, and the hearing closed on the latter date. The parties submitted posthearing briefs, which I have considered.

B. Oral Amendment to Complaint

During the hearing, the General Counsel orally amended paragraph 12 of the complaint. Under this amendment, the existing paragraph 12 became subparagraph 12(a). The amendment raised previously unalleged matters in newly created subparagraphs 12(b) and (c). A question has now arisen concerning the substance of the new subparagraph 12(b).

According to the official transcript, the new subparagraph 12(b) alleged that "About September 6, 2002, Respondent awarded a discretionary wage increase to its employee, Nate Sloan." The General Counsel's posthearing brief asserts that the official transcript got the date wrong by 1 year. In a footnote, the General Counsel's brief moves to correct the transcript to show the date as "September 6, 2003." For the following reasons, I deny the General Counsel's motion.

As a procedural matter, a footnote in a posthearing brief is not the ideal place for a motion. Different portions of the Board's Rules and Regulations apply to motions and posthearing briefs. For example, a motion is part of the official record but a brief to the administrative law judge is not. (Compare, Section 102.26 of the Board's Rules to Section 102.45(b).)

However, my decision to deny the General Counsel's motion rests on factual rather than procedural grounds. My notes are consistent with the transcript in recording that counsel for the General Counsel gave the date as September 6, 200*2*, not 2003, when he announced the wording of the new complaint subparagraph 12(b).

Respondent objected to the amendment, stating that the allegation was barred by Section 10(b) of the Act, which includes a 6-month statute of limitations. The Union filed the initial charge in Case 7–CA–45823 on January 17, 2003. It would make no sense for Respondent to raise a 10(b) defense concerning events which took place *after* the filing of the charge.

Because my notes and Respondent's objection are consistent with the September 26, 2002 date recorded in the transcript, I conclude that the transcript already is correct on this point. Therefore, I deny the General Counsel's motion to correct it.

C. Undisputed Allegations

Based upon admissions in Respondent's answer, I find that the Government has proven the allegations raised in the following paragraphs of the second amended consolidated complaint: 1(a)–(f), 2(a)–(b), 3, 4, 5, 6(a)–(b), 7, 8(a)–(b), 11, 12, 13, 15, 17, 20, and 21(a).

More specifically, I find that the Charging Party filed and served the charges as alleged. Further, I find that at all material times, Respondent has been a contractor engaged in the construction, installation, and maintenance of fire sprinkler and other security systems; that it maintains an office and place of business in Grand Rapids, Michigan, and facilities in certain other Michigan locations; that during the calendar year ending December 31, 2002, Respondent purchased and received at its Grand Rapids facility and at jobsites in the State of Michigan materials and supplies valued in excess of $50,000 directly from suppliers located outside the State of Michigan; and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Additionally, I find that at all material times, the following individuals have been Respondent's supervisors and agents within the meaning of Section 2(11) and (13) of the Act, respectively: President Darrell Thomas, General Manager Richard Knipp, Foreman Brett Thomas, and Service Manager Ted Hembroff. Moreover, I find that at all material times, accountant Tim Callahan and Office Manager Vandy Young have been Respondent's agents within the meaning of Section 2(13) of the Act.

Further, I find that at all material times, the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act. Respondent's answer admits, and I find, that on July 26, 2001, the Charging Party was certified as the exclusive collective-bargaining representative of the following unit (the unit):

> All full-time and regular part-time employees engaged in the installation and service of fire protection sprinkler pipe and chemical system pipe employed by the Respondent at, or based at, 2101 Martindale S. W. Grand Rapids, Michigan, but excluding alarm technicians, employees engaged in the sale, installation and service of portable chemical extinguishers, office clerical employees, and guards, professional employees and supervisors as defined in the Act.

Respondent also admits, and I find, that the unit constitutes a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

Respondent denies that the Charging Party remains the exclusive representative of the unit. However, its answer admits that the Charging Party had been the exclusive representative until Respondent withdrew recognition in October 2003. Based on this admission, I find that at all times from July 26, 2001, until the withdrawal of recognition, the Charging Party was the 9(a) bargaining representative of the unit. Whether the Charging Party continues to enjoy this status will be addressed below.

The complaint alleges, Respondent admits and I find that on June 5, 2002, Respondent and the Charging Party entered into an informal settlement agreement in Cases 7–CA–44437, 7–CA–44872, and 7–CA–44750, the terms of which modified the description of the unit as follows:

> The bargaining unit work shall consist of the installation and repair of fire sprinkler systems without geographic limitation, and restaurant systems of the type performed by Marty Shields, but shall not include the installation and repair of any other chemical or gas special hazard systems, and shall not include the visual inspection and related testing of any systems. Marty Shields shall remain a member of the bargaining unit.

The complaint also alleges, Respondent admits, and I find that Respondent implemented discretionary starting wage rates for the employees named below on or about the dates set forth opposite their names, and since those dates has given the employees named below discretionary wage increases:

> (a) Phillip Moss—July 8, 2002(b)Jason Engle—July 22, 2002

Based on Respondent's admissions, I find that sometime in November 2002, Respondent awarded a discretionary wage increase to employee Mike King; that about September 6, 2002, Respondent awarded a discretionary wage increase to employee Nathan Sloan; and that sometime in September or October 2003, Respondent awarded a discretionary wage increase to its employees Sean Wiggers and Evan Timmerman.

Respondent also has admitted that it implemented discretionary vacation accrual rates for employees Phillip Moss and Jason Engle on July 8 and 22, 2002, respectively. I so find.

As discussed above, the General Counsel orally amended complaint paragraph 12 at hearing so that it now has three subparagraphs. Respondent's answer admitted the allegations in subparagraph 12(a) and Respondent orally admitted the allegations in subparagraphs 12(b) and (c). Based on these admissions, I find that at some time in November 2002, Respondent awarded a discretionary wage increase to its employee Mike King; that about September 6, 2002, Respondent awarded a discretionary wage increase to its employee Nathan Sloan; and that at some time in September or October 2003 Respondent awarded discretionary wage increases to employees Sean Wiggers and Evan Timmerman.

Respondent orally amended its answer to admit not only the facts alleged in the expanded complaint paragraph 12, but also the legal conclusion to be drawn from those facts. This legal conclusion is found in complaint paragraph 22. At hearing, Respondent amended its answer to this paragraph by stating as follows:

> With respect to allegations in paragraph 22 of the amended complaint, Respondent amends its answer to state as follows: Respondent admits that by its conduct described in paragraph 12 of the amended complaint Respondent has been failing and refusing to bargain collectively with the exclusive collective–bargaining representative of the unit in violation of Section 8(a)(1) and (5) of the Act. In all other respects, the allegations of paragraph 22 are denied.

By amending its answer in this manner, Respondent appears to be admitting that it committed unfair labor practices by the acts alleged in complaint paragraph 12. (However, Respondent also has raised a 10(b) defense with respect to complaint subparagraphs 12(b) and (c).) Respondent may have made these particular admissions to support its argument that the employees named in the amended complaint paragraph 12—Mike King, Nathan Sloan, Sean Wiggers, and Evan Timmerman—were members of the bargaining unit, which the General Counsel disputes. These matters will be discussed further below.

Respondent has admitted, and I find, that it implemented discretionary vacation accrual rates for employee Phillip Moss on July 8, 2002, and for employee Jason Engle on July 22, 2002.

Respondent also has admitted that the changes it made in wage and vacation accrual rates relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purpose of collective bargaining. I so find.

Respondent has admitted, and I find, that since about June 19, 2003, the Charging Party, by letter, has requested that Respondent furnish the Charging Party with the following information:

1. A list of present jobs and jobs which have been awarded, with their approximate starting dates.
2. A list of all employees who have been hired, showing their race, national origin, sex, sexual preference, age, disability and religion.
3. A list of all employees who were promoted, transferred, disciplined or demoted showing their race, national origin, sex, sexual preference, age, disability or religion.
4. A list of all employees who were either denied promotions or transfers showing their race, national origin, sex, sexual preference, age, disability or religion.
5. Copies of all charges or complaints received from any State or Federal administrative agency or any court suit concerning discrimination or harassment based upon race, national origin, sex, sexual preference, age, disability or religion [including, with respect to any such complaint, charge or lawsuit] not only a copy of the complaint, charge or lawsuit, but a copy of any document showing the resolution or conclusion of that litigation, complaint or charge.
6. A copy of any affirmative action plan which is or has been in existence during the last five years.
7. A copy of any contracts which have any equal employment clauses or guarantees, as well as any contracts which have any affirmative action clauses or guarantees.
8. Copies of any internal investigative reports with respect to any complaints, charges or allegations concerning discrimination or harassment based on race, national origin, sex, sexual preference, age, disability or religion.
9. Copies of all sexual harassment, antidiscrimination or discrimination policies.

Respondent also has admitted that the information described above is necessary for, and relevant to, the Charging Party's performance of its duties as the exclusive collective-bargaining representative of the unit. With one exception discussed below, I so find.

Respondent has admitted, and I find, that on or about July 16 and August 12, 2003, Respondent, by letters addressed to the Charging Party from its legal counsel, has conditioned meeting upon advance written submission by the Charging Party of a detailed agenda and proposals.

Additionally, Respondent has admitted that on or about October 15, 2003, Respondent, by a letter addressed to the Charging Party from its legal counsel, withdrew recognition from the Charging Party as the exclusive collective-bargaining representative of the unit. I so find.

Contested Allegations

I. EMPLOYEES IN THE BARGAINING UNIT

Respondent has admitted that it withdrew recognition from the Union on about October 15, 2003, as alleged in complaint paragraph 21(a). However, it has denied the allegations, raised in complaint paragraphs 21(b) and (c), that it acted unlawfully.

The lawfulness of the withdrawal of recognition depends upon whether the Union continued to enjoy the support of a majority of the bargaining unit employees. Respondent claims that signatures on a petition establish that a majority of the bargaining unit employees no longer supported the Union. However, the Union and the General Counsel argue that many of the individuals who signed the petition were not then bargaining unit employees, and so their signatures do not count.

To determine whether a majority of unit employees had forsaken the Union, I must first figure out who was in the unit at the time of the petition, and who was not. Undertaking that task leads into the realm of complaint paragraph 9.

Complaint Paragraph 9 (the Union's 9(a) Status)

Complaint paragraph 9 alleges that at all times since July 26, 2001, based on Section 9(a) of the Act, the Charging Party has been the exclusive collective-bargaining representative of the unit. In its answer, Respondent admits that the Charging Party was the 9(a) representative until October 2003, when Respondent withdrew recognition.

Respondent contends that it lawfully withdrew recognition after receiving a petition signed by a majority of the bargaining unit employees. Both the General Counsel and the Union dispute the assertion that a majority of unit employees signed this petition.

To decide whether the Union's status as exclusive bargaining representative continues, I must examine the sufficiency of the petition. More specifically, I must determine whether the petition constitutes evidence that a majority of the unit employees had become disaffected with the Union. Doing that begins with ascertaining who was in the unit when Respondent received the petition.

The parties have stipulated that the following employees were in the unit: Jason Engle, Kevin Hanes, Mike King, Brandon Lewis, Aaron Maxwell, Jeff McDuffie, Derek Michael, Phil Moss, Marty Shields, Lou Staples, and Greg Zittel. I so find.

Contrary to Respondent, the Union contends that the unit included Brad Hallock, Archie Lester, and Sean Maser. Hallock's testimony, which I credit, establishes that he resigned from employment with Respondent on July 16, 2003. Maser credibly testified that he quit in August 2003. Therefore, I conclude that neither Hallock nor Maser was in the bargaining unit when Respondent withdrew recognition in October 2003.

Lester did not testify and the record provides little information about his employment with Respondent. It does not establish that he did bargaining unit work except on one occasion in 2001, about 2 years before the withdrawal of recognition. I conclude that Lester was not in the bargaining unit in October 2003.

Respondent asserts, contrary to the General Counsel and the Union, that the following individuals are in the bargaining unit: Austin Aamodt, Nathan Sloan, Evan Timmerman, and Sean Wiggers. In deciding whether each of these individuals was in the bargaining unit in October 2003, I will examine whether that person was performing bargaining unit work at that time.

As discussed above, Respondent entered into a June 5, 2002 settlement agreement which defined bargaining work to be "the installation and repair of fire sprinkler systems without geographic limitation, and restaurant systems of the type performed by Marty Shields." This definition will guide me in determining whether a particular employee was performing such work.

In 2001, the Respondent and the Union entered into a stipulation concerning which employees would be eligible to vote in the upcoming election. The parties agreed that the 14-named employees had been employed in the bargaining unit during the payroll period for eligibility and that they were the only eligible voters. The parties further stipulated that "the eligibility issues resolved herein are final and binding by me in accordance with the Board's policy in *Norris-Thermador Corp.*, 119 NLRB 1301 [1958]."

Austin Aamodt's name appeared on this *Norris-Thermador* list. The record indicates that Aamodt continued to perform bargaining unit work until he was laid off in February 2003.

In a March 6, 2003 letter, Respondent informed the Union that it intended to recall two laid-off employees "for sprinkler work" starting March 10, and that "Vanguard also intends to call back Austin Aamodt to do non-bargaining unit work starting the next day."

After Aamodt returned from layoff, he worked primarily in Respondent's shop. If he had worked solely in the shop, his position clearly would have been outside the bargaining unit. However, from time to time, Respondent would assign Aamodt to install sprinklers. Aamodt did not testify and it is unclear how often he actually performed this bargaining unit work during the summer and fall of 2003.

Aamodt's name appears on a list of bargaining unit employees which Respondent gave to the Union on about June 27, 2003. This list described the dental and health benefits provided to each listed employee. The record indicates that the Union did not object to the presence of Aamodt's name on this list. However, Respondent did not specifically ask the Union if it agreed that all listed employees were members of the bargaining unit. Therefore, I do not believe that the Union's failure to object to Aamodt's name signifies either assent or acquiescence.

In determining whether Aamodt was a member of the bargaining unit at the time Respondent withdrew recognition from the Union, I will consider whether he was regularly employed performing bargaining unit work for sufficient periods of time to demonstrate that he had a substantial interest in the unit's wages, hours, and conditions of employment. See *M. C. Decorating, Inc.*, 306 NLRB 816 (1992), citing *Oxford Chemicals*, 286 NLRB 187 (1987).

The amount of bargaining unit work which Aamodt performed *before* his transfer to Respondent's shop is irrelevant in determining whether he retained his status as a member of the bargaining unit after the transfer. That status depends on the regular and substantial performance of unit work *after* the transfer. *Martin Enterprises*, 325 NLRB 714, 715 (1998).

From the record, it is clear that after the transfer, Aamodt spent most of his working time performing duties outside the bargaining unit. However, credible evidence does not establish the number, frequency, and duration of his stints performing sprinkler installation or other bargaining unit work. Therefore, the record does not support a conclusion that Aamodt was a dual-function employee at the time Respondent withdrew recognition.

The status of a dual-function employee must be based upon what work the employee actually performed rather than by what management intended when it transferred the employee to a different job. Even if an employer planned for an employee to do both bargaining unit work and nonbargaining unit work, that intention would mean little if, in fact, the employee actually performed only the latter.

Therefore, I give little weight to the testimony of Respondent's chief financial officer, Timothy Callahan, that he understood Aamodt "would work in the shop and when needed, he would do sprinkler work." Moreover, this testimony should be considered together with the next question and answer:

> Q. Okay, and at the time he was initially called back, did you anticipate that in that month or two, that he would be doing sprinkler installation work?
>
> A. Possibly.

Certainly, the amount of sprinkler installation work would vary, depending upon the number and size of sales, so management could not know for sure how often it would pull Aamodt out of the shop and assign him to an installation project. However, Callahan's tentative answer—"Possibly" —does not suggest that management expected to use Aamodt's services *regularly* to perform bargaining unit work.

Significantly, Respondent's March 6, 2003 letter to the Union, announcing its intent "to call back Austin Aamodt to do non-bargaining unit work," says nothing about Aamodt continuing to perform bargaining unit work even on an occasional basis. Presumably, if Respondent had expected to assign Aamodt bargaining unit work on a regular or periodic basis, it would have mentioned this intention in the letter.

Respondent's expectations, of course, do not decide the issue. However, the absence of persuasive evidence that Respondent intended to use Aamodt as a dual-function employee tends to bolster the conclusion that Aamodt actually did not perform bargaining unit work on a regular basis or for sufficient periods of time.

In sum, the evidence falls short of establishing that, after his transfer to Respondent's shop, Aamodt spent enough time installing sprinklers to retain a substantial interest in the wages, hours, and working conditions of bargaining unit employees. Therefore, I conclude that Aamodt was not a dual-function employee and was not a member of the bargaining unit at the time Respondent withdrew recognition.

Respondent also contends that Nathan Sloan was a bargaining unit employee in October 2003. Sloan testified that he began work for Respondent in about June 2002 as a shop employee, and remained in that position until about August 1, 2003, when he was laid off for 1 day. When Sloan returned from the layoff, the supervisor over the sprinkler division, Brett Thomas, told him that he was going to be a sprinkler fitter. Later, Sloan received a raise because of this change.

During Sloan's first assignment in this new position (the "Jackson Products" job), he did not perform sprinkler fitting. Instead, much of his work involved removing an old sprinkler system which Respondent's crew was replacing. During part of that time, he also fabricated parts for the sprinkler system being installed. Sloan performed this fabrication work at Respondent's shop.

Sloan spent much of August 2003 working on this project. Late that month, he began working on another project, which entailed installing a new sprinkler system. During the week ending August 30, 2003, Sloan worked 40 hours on this project.

The next week, Sloan worked 35-1/2 hours installing a new sprinkler system at a company called Biolife. After that, Sloan spent a number of consecutive weeks working in Respondent's shop.

It is unclear how many hours Sloan worked during the weeks ending Saturday, September 13, 2003, and Saturday, September 20, 2003. Sloan's testimony indicates that he spent this working time in Respondent's shop, rather than installing sprinklers. The following week, he worked for 37-1/2 hours in the shop and spent no time doing sprinkler installation.

Sloan testified that during the next week, ending Saturday, October 4, 2004, he worked 34-1/2 hours, all of them in the shop. The next week, ending October 11, 2004, he worked 36 hours, all in the shop. The record does not indicate where Sloan worked during the week ending October 18, 2004. The next week, ending October 25, 2004, Sloan worked 40 hours in the shop.

Sloan testified that when supervisor Thomas told him that he would be a sprinkler fitter, he also said that when the work of sprinkler installation got "slow," Sloan would work in the shop. He further testified that during the period following the Biolife job, when he was assigned to work in the shop, he understood that when installation work got busy again, he would be assigned to do it.

In *Arlington Masonry Supply*, 339 NLRB 817 (2003), the Board concluded that the evidence was insufficient to warrant a finding that a worker named Hanson was eligible to vote as a dual-function employee:

> Thus, the record contains only estimates of the amount of time Hanson spent performing unit work, and these estimates ranged from a low of 15 percent to a high of 25 percent. Under Board precedent, an employee spending 15 percent of his time performing unit work is not included in the unit. See, e.g., *Continental Cablevision,* 298 NLRB 973, 974–975 (1990) (excluding employees spending approximately 17 percent of their time performing unit work). Although in some weeks Hanson may have spent up to 25 percent of his time performing unit work, there is no evidence to show how often this occurred. In sum, on this record, we cannot conclude that Hanson "regularly perform[s] duties similar to those performed by unit employees for sufficient periods of time to demonstrate that [he has] a substantial interest in working conditions of the unit." *Martin Enterprises*, 325 NLRB 714, 715 (1998). [339 NLRB No. 817 fn. 3.]

The record does not support a finding that Sloan spent any time in October 2003 performing unit work. Moreover, the evidence establishes only that Sloan spent 1 week doing such work in September 2003. Thus, in this case, as in *Arlington Masonry Supply*, supra, there is insufficient basis to conclude that the employee in question regularly performed duties similar to those performed by unit employees for sufficient periods of time to demonstrate that he had a substantial interest in the working conditions of the unit. Therefore, I conclude that

Sloan was not a member of the bargaining unit at the time Respondent withdrew recognition.

Respondent further contends that Evan Timmerman was a member of the bargaining unit in October 2003. Timmerman began work for Respondent in March 2003 and was assigned to "special hazards" systems. Employees performing this work are not in the bargaining unit. Two other employees, Sean Wiggers and Paul Florshinger, worked with Timmerman in that department.

Around August 2003, Respondent sent Timmerman to the same Jackson Products job on which Sloan had worked. Like Sloan, Timmerman helped remove the old sprinkler system which was being replaced. He worked at this jobsite for 1 to 2 weeks.

Up until his work on the Jackson Products job ended, Timmerman had not performed any sprinkler installation work for Respondent. After the Jackson Products job, however, Timmerman did begin receiving assignments to install sprinkler systems.

Timmerman recalled the names of some projects, but his testimony does not establish how many hours he spent working on each of these projects. The record does not establish how much of Timmerman's total worktime in October 2003 was devoted to bargaining unit work but there are hints that the percentage was not high. For example, the General Counsel introduced into evidence the pretrial affidavit of Sean Wiggers, who worked with Timmerman in the "special hazards systems" department. In his affidavit, Wiggers states that Timmerman "assisted with the demolition of the old sprinkler system at Jackson Products, but other than that, I believe he [h]as worked exclusively on special hazards systems."

Wiggers' testimony during the hearing indicates that Timmerman may have performed slightly more bargaining unit work than Wiggers' pretrial affidavit suggests. Wiggers testified as follows:

> Q. And isn't it true that the only job that Mr. Timmerman worked on, that wasn't a Special Hazards system, was a Jackson Products job?
>
> A. No, I believe we worked on a couple other very small sprinkler jobs before that Jackson Products.

Based on my observations of the witnesses, I conclude that Wiggers' memory is more reliable than Timmerman's.

Timmerman did estimate that *after* October 2003, he spent probably 30 percent of his worktime installing sprinklers. However, testimony concerning how much bargaining unit work Timmerman did after Respondent withdrew recognition does not shed much light on Respondent's assertion that Timmerman was a bargaining unit employee earlier. It doesn't help determine Timmerman's status either at the time he signed the petition withdrawing support from the Union or when, based on that petition, Respondent withdrew recognition.

Although the General Counsel introduced some of Timmerman's payroll records into evidence, these documents only show the hours he worked, not how much time he spent performing bargaining unit work. Absent evidence concerning the frequency of Timmerman's assignments to install sprinklers, the record affords no basis to conclude that he *regularly* performed duties similar to those of bargaining unit employees. Without evidence concerning the amount of time Timmerman spent doing bargaining unit work, there is no basis to conclude that these periods were sufficient to demonstrate that Timmerman had a substantial interest in the working conditions of the unit. Because the record fails to establish that Timmerman was a bargaining unit employee in October 2003, I conclude that he was not.

Respondent also contends that Sean Wiggers was a member of the bargaining unit at the time it withdrew recognition in October 2003. Respondent hired Wiggers in late June 2002. For the first 6 months, he worked on a crew installing pipe and sprinkler systems. Then, in December 2002 or January 2003, Respondent assigned Wiggers to work in "special hazards" systems. He has continued to work in that department since that time.

As discussed above, the Respondent and the Union previously agreed on a bargaining unit description which specifically excludes work performed by employees in the special hazards department. Although Wiggers did perform some work removing the old sprinkler system at the Jackson Products jobsite, I conclude that this work, on a one-time basis, does not constitute *regular* work within the bargaining unit. Therefore, Wiggers is not a dual-function employee and is not a member of the bargaining unit.

To summarize, I conclude that Austin Aamodt, Brad Hallock, Archie Lester, Sean Maser, Nathan Sloan, Evan Timmerman, and Sean Wiggers were not members of the collective-bargaining unit at the time Respondent withdrew recognition on about October 15, 2004. Further, I conclude that on this date, the bargaining unit consisted of the following 11 employees: Jason Engle, Kevin Hanes, Mike King, Brandon Lewis, Aaron Maxwell, Jeff McDuffie, Derek Michael, Phil Moss, Marty Shields, Lou Staples, and Greg Zittel.

The following eight signatures appear on the petition: Sean A. Wiggers, Evan Timmerman, Jeff McDuffee, Nathan Sloan, Austin Aamodt, Jack Michael, Marty Shields, and Lon Stamples. However, because Wiggers, Timmerman, Sloan, and Aamodt were not members of the collective-bargaining unit, their signatures may not be counted in determining whether a majority of bargaining unit employees had manifested a desire not to be represented by the Union. The remaining four signers were unit employees, and, therefore, their signatures should be counted.

The bargaining unit included 11 employees at the relevant time, but only 4 of them signed the petition. Therefore, I conclude that a majority of the bargaining unit employees had not indicated a desire not to be represented by the Union. Further, I find that the Government has proven that at all material times, the Union has been the exclusive collective-bargaining representative of the employees in the unit, as alleged in complaint paragraph 9.

II. UNILATERAL CHANGE ALLEGATIONS

A. Complaint Paragraph 10 (Change in Cell Phone Policy)

Paragraph 10 of the complaint alleges that “about December 5, 2002, Respondent implemented a policy requiring unit employees to reimburse Respondent for certain costs of subscribing to Nextel cell phone service.” Respondent denies this allegation.

The record establishes that sometime before December 2001, Respondent began furnishing cellular telephones to certain employees and paid Nextel a fixed monthly amount for each cell phone. This monthly amount paid for sending and receiving messages, voice mail service, and using the telephone for a specified number of minutes (“air time”).

The alleged unilateral change concerns what action Respondent would take if an employee spent more time on his cell phone than the number of minutes provided in the basic plan. When the telephone company’s bill arrived, who would pay for the additional charges?

According to the Government, Respondent absorbed the extra expense until December 5, 2002, when it began deducting these amounts from employees’ paychecks. Further, the General Counsel asserts that Respondent made this change without first notifying and bargaining with the Union, thereby violating Section 8(a)(5) of the Act.

Respondent counters that it made no change in reimbursement policy on December 5, 2002. Before that date, employees had to pay for cell phone use which exceeded the amount of “air time” provided in the basic plan. The only significant difference was that the employee formerly assigned to administer this policy didn’t do a very good job deducting the extra charges from employees’ pay. When management reassigned this task to someone else, the payroll office began making the deductions consistently.

The record establishes that a year before the alleged unilateral change, Respondent had a cell phone policy very similar to the one it allegedly imposed unilaterally on December 5, 2002. Respondent explained this policy to employees in a December 7, 2001 memorandum:

1. This letter memo is to clarify the charges that will be billed to you if you dial information, or exceed your monthly minutes.
2. Effective 12/7/01 all information calls will be charged back to you at a $1.19 each.
3. If you need information call this office. We will be glad to help you with the number you need.
4. Vanguard will pay your Nextel approved monthly plan amount. Any charges over this amount will be billed back to you.
5. This amount will cover all two way messages, voice mail access, and the monthly number of minutes for cellular air time as per our plan. Any charges over the amount will be billed back to you. Our current plan allows 200 minutes per user. Please watch your cellular minutes, use your 2 way more. Charges for extra cellular minute is $.25 each.
6. Remember your Nextell usage is paid by Vanguard and is not intended to be for your private use.
7. Just a friendly reminder that the retrieval of your voice mail messages are charged against your cellular time.
8. If there should be any questions, please contact Rick or Sharon.

(R. Exh. 22; original in all capital letters.) On December 5, 2002, Respondent issued individualized memoranda to employees using cell phones. Each memorandum included a general statement of policy, as well as the sentence, “You owe Vanguard $______. This will come out of your next pay check.” (Each memo specified the amount owed by the particular employee who received it.)

The December 5, 2002 memoranda described a cell phone policy quite similar to that announced a year earlier. Specifically, the December 5, 2002 memoranda stated:

> As of the first of this month, our Nextel monthly plan is changing. The new plan that will be in effect will consist of the following:
>
> 250 cell minutes anytime
> 500 cell minutes nites and weekends 9:00 pm to 7:00 am
> 100 direct connect minutes
> Voicemail is included
> Caller ID is included
> Extra minutes over the above 250 minutes, will be billed at $.35 per minute.
>
> Still in effect is the cost of calls to information $1.19 each, and incurred additional extra charges for long distance on personal calls and text messaging.

(GC Exh. 22, original in all capitals.) In some ways, the December 5, 2002 cell phone policy changes the policy described in the December 7, 2001 memo. The charge for extra service rose from 25 cents to 35 cents per minute. On the other hand, such charges do not begin until after 250 minutes, thus, giving the employee 50 minutes more “free” calling time.

To violate Section 8(a)(5), a unilateral change must be material, substantial and significant. *Crittenton Hospital*, 342 NLRB No. 67 (2004), citing *Fresno Bee*, 339 NLRB 1214, 1216 (2003), and *Peerless Food Products*, 236 NLRB 161 (1978). Because the increase in “free” minutes tends to offset the increased charge for an “extra” minute, these changes would not appear to have a substantial or significant effect on working conditions. Therefore, I conclude that the *announced* change in cell phone policy does not violate Section 8(a)(5).

However, under the Government’s theory, the violation inheres in Respondent’s *implementation* of a change in cell phone policy, not in the announcement of it. Stated another way, the allegedly unlawful change does not involve placing a new policy “on the books” but rather enforcing more strictly a policy which had lain dormant before.

To prove that Respondent did not enforce its existing cell phone policy before December 5, 2002, and, thus, did not require employees to reimburse cell phone expenses until that time, the General Counsel relies, in part, on the documents Respondent produced pursuant to subpoena. More precisely, the government relies on the conclusion to be drawn from the absence of certain records sought by the subpoena.

The General Counsel's subpoena called upon Respondent to produce "true copies of all documents showing any portion of Respondent's monthly cellular telephone bill being paid by employees from January 2001 through October 2003." However, the records Respondent produced clearly establish only one instance in which Respondent billed an employee for cell phone minutes before December 5, 2002.

This instance involved employee Eric Anderson, who signed a "Cell Phone Usage With Deduction Authorization" dated January 5, 2001. By doing so, Anderson acknowledged that he had exceeded the allotted number of cell phone minutes and authorized charges for this use to be deducted from his pay.

Anderson's "Authorization," thus, establishes one instance in which Respondent required an employee to pay cell phone charges before December 5, 2002. Respondent's failure to document other such instances suggests that there were none.

Respondent did produce a list purporting to show other instances in which it charged employees for cell phone use. According to the list, in evidence as Respondent's Exhibit 40, these instances go back to June 23, 2000. However, I have little confidence in the accuracy of this list and do not credit it.

According to Respondent's chief financial officer, Timothy Callahan, he obtained the information for this list from post-it notes he received from Office Manager Vandi Young. These notes provided information which Young obtained from an administrative employee, Sharon Bishop, concerning the amounts to be deducted from each employee's pay.

Respondent did not produce these post-it notes, which Callahan discarded after transferring the information to a spreadsheet. Accordingly, there is no way to verify that Callahan accurately copied the information on the post-it notes.

Additionally, the information came to Callahan secondhand. Young, who wrote the notes, obtained the information from Bishop. Neither Young nor Bishop testified, and there is no way to determine how carefully Young transcribed the information Bishop gave her.

Moreover, there is some reason to question the reliability of the information Bishop provided. Respondent had assigned her to administer the cell phone policy, but ultimately relieved her of that responsibility because of poor performance. During his testimony, Callahan explained why Respondent transferred the duty to someone else in December 2002:

> Q. What happened?
>
> A. It came to my knowledge that it wasn't being handled in a timely fashion, nor was she handling the Nextel account very well.

If Bishop had been handling the Nextel account that poorly, I cannot simply assume that she reliably reported the cell phone information to Young.

The information on this list also does not agree with the bills which Respondent gave to employees, and produced pursuant to subpoena. Employee Marty Shields received bills for $83.23 and $70.76, which are in evidence as part of General Counsel's Exhibit 22. These amounts should show up on Respondent's list, if it is accurate. However, the $70.76 figure does not appear.

When cross-examined about this discrepancy, Callahan raised the possibility that there might be a "multiple combination." Although Callahan's meaning is not entirely clear, I believe he meant that Shields may have paid the bill in installments which, added together, totaled $70.76. However, the math doesn't work. The list (R. Exh. 40) indicates that Shields received the following bills for cell phone use:

8/30/2002	$30.50	4/25/2003	$84.31
12/20/2002	54.81	8/1/2003	52.09
1/17/2003	11.03	8/29/2003	83.23
2/14/2003	23.54		

Both of Shields' bills in General Counsel's Exhibit 22 are dated December 5, 2002, but one of them is for the same amount, $83.23, as the August 29, 2003 bill listed on Respondent's Exhibit 40. However, the list does not indicate that Shields ever received a bill for $70.76, and no combination of the amounts on the list adds up to $70.76. When asked about this matter on cross-examination, Callahan did not answer responsively:

> Q. I am asking you, can you tell from Respondent Exhibit No. 40, whether Marty Shields was billed $70.76.
>
> A. I can tell he was billed at least $70.76.
>
> Q. Okay, but that wasn't my question, now. Can you tell, on that bill when he was billed the $70.76?
>
> A. It could be a multiple combination of some of these.
>
> Q. Well, if you want, we can go through them and you can add all of the varying different combinations, but are any of them going to total $70.76?
>
> A. Perhaps there is another Marty Shields.

No evidence supports Callahan's speculation that "perhaps there is another Marty Shields" and it is difficult to believe that Callahan raised this possibility seriously. On June 5, 2002, Respondent and the Union entered into an agreement which redefined the bargaining unit and which specifically referred to Marty Shields. The new unit description, quoted above, states that "Marty Shields shall remain a member of the bargaining unit" but gives no indication that Respondent employed more than one person with this name.

After some further cross-examination, Callahan acknowledged that there was no combination of charges on the list totaling $70.76 for Marty Shields. Clearly, the list does not reflect reliably how Respondent billed its employees for cell phone use. Therefore, I accord it no evidentiary weight.

In sum, the credited documentary evidence does not show that Respondent had a past practice of billing employees for cell phone use. The exhibits do indicate that on one occasion, on January 5, 2001, Respondent billed employee Anderson. However, this one instance, almost 2 years before the alleged unilateral change, neither amounts to an established practice nor defines the status quo.

In addition to written records, the General Counsel relies on the testimony of three employees—Brad Hallock, Mike King, and Sean Maser—to prove that Respondent did not begin requiring employees to pay for any cell phone expenses until around December 5, 2002.

Hallock began work for Respondent in 1999. He quit his position with Respondent on July 16, 2003. Accordingly, I have found that he was not a member of the bargaining unit at the time Respondent withdrew recognition. However, I must now determine whether Hallock held a job within the bargaining unit before his resignation.

While working for Respondent, Hallock installed sprinkler systems, among other duties. Initially, Hallock testified that he "never dealt with gasses or chemicals in the system. It was just water or air." From this testimony, it would appear that he did not install "special hazards" systems that extinguished fires with gas rather than with water. However, later in his testimony Hallock admitted having performed some work on special hazards systems about 9 months before the representation election.

At the time of the alleged unilateral change concerning cell phone reimbursement, Hallock was no longer installing special hazards systems. I conclude that during this time period, he was a member of the bargaining unit.

Hallock testified that Respondent began providing him cell phone service around December 1999, and that he never received a bill for such service from Respondent until January 2003. The "bill" which Hallock received is actually a copy of the December 5, 2002 memo, quoted above, on which the amount $55.34 appears in handwriting. This portion of the memo states, in bold type:

> You owe Vanguard $ 55.34 This will come out of your next pay check.

According to Hallock, when he asked Office Manager Vandi Young about the bill, she replied that he would have to sign a memo and if he didn't sign, management would discontinue his cell phone service. Although Hallock's testimony is unclear on this point, it appears that Young was referring to the December 5, 2002 memorandum informing each employee how much he owed.

Even assuming that Respondent had not billed Hallock for cell phone use before January 2003, that fact alone does not establish any change in Respondent's policy. Possibly, the bill that Hallock received in January 2003 only signified a change in how much Hallock used the cell phone, not in Respondent's cell phone policy.

Under the policy described in management's December 7, 2001 memo, an employee would only be billed if he called "information" (directory assistance) on the phone or used it for more than 200 minutes per month. To establish that Respondent changed its policy as applied to Hallock, the Government must show that in the past, Hallock had incurred such extra charges without Respondent seeking reimbursement for them.

The General Counsel subpoenaed the cell phone bills which Respondent received from Nextel, and introduced these records into evidence. Each bill itemizes the number of minutes each cell phone was used in a particular accounting period. These records show the number of minutes used by Hallock's phone each month:

BILLING DATE	**BILLING PERIOD**	**MINUTES**
August 8, 2001	07/07/01—08/06/01	No entry
September 8, 2001	08/07/01—09/06/01	No entry
October 7, 2001	09/07/01—10/06/01	No entry
November 7, 2001	10/07/01—11/06/01	No entry
December 7, 2001	11/07/01—12/06/01	No entry
January 7, 2002	12/07/01—01/06/02	8:34
February 7, 2002	01/07/02—02/06/02	3:48
March 8, 2002	02/07/02—03/06/02	0:28
April 7, 2002	03/07/02—04/06/02	151:52
May 7, 2002	04/07/02—05/06/02	95:30
June 8, 2002	05/07/02—06/06/02	No entry (page 3 of this document is missing)
July 8, 2002	06/07/02—07/06/02	29:26
August 8, 2002	07/07/02—08/06/02	72:54
September 12, 2002	08/07/02—09/06/02	135:23
October 10, 2002	09/07/02—10/06/02	97:24
November 11, 2002	10/07/02—11/06/02	152:01
December 11, 2002	11/07/02—12/06/02	75:58
January 11, 2003	12/07/02—01/06/03	2:02

In none of these months did Hallock's cell phone exceed the 200 "free" minutes. Respondent would have had no occasion to seek reimbursement from Hallock for cell phone service in 2002. Under the policies explained in the December 7, 2001 and December 5, 2002 memoranda, Hallock would not have been obliged to pay anything for cell phone service in 2002 because he never exceeded the monthly limit of "free" minutes. Accordingly, the records offer no basis to conclude that Respondent had a practice of overlooking its right to reimbursement but abruptly decided to go "by the book" in January 2003.

However, something certainly *did* change. In January 2003, Respondent ignored its own published policy by seeking a reimbursement it was not entitled to receive under either the December 7, 2001 memo (200 "free" minutes per month) or the December 5, 2002 memo (250 "free" minutes per month). Hallock never went beyond these limits. Nonetheless, Respondent billed him for $55.34.

Reducing an employee's pay by this amount certainly would constitute a material, substantial and significant change in terms and conditions of employment. However, the record does not establish either that Hallock paid this bill or that Respondent deducted the amount from Hallock's pay.

As discussed above, Office Manager Young told Hallock he would have to sign the bill or lose his cell phone use. But Hallock's testimony does not establish either that he signed the bill or paid it. The bill itself is not marked "paid," although certain similar bills also in evidence (as GC Exh. 22) are marked paid. Thus, the record does not establish that the terms of Hallock's employment changed in any material way.

Moreover, some inconsistencies raise questions about the reliability of Hallock's testimony. For example, Hallock testified that management allowed him *300* free minutes of "air time" per month, but the December 7, 2001 and December 5, 2002 memoranda set the limit at 200 and 250 minutes, respectively.

Hallock stated in his pretrial affidavit, “I do not know ever if I went over the 300 minutes because I never received a bill from the company for the portion of the phone bill until about March, 2003.” During the hearing, however, Hallock testified that he received the bill in *January* 2003, not March.

Further, Hallock’s testimony contradicts his pretrial affidavit concerning what a company representative told him about Respondent’s cell phone policy. This individual was Sharon Bishop, whom Hallock identified as the person in charge of cell phone services at Vanguard.

In 2001, Hallock had a conversation with Bishop concerning Respondent’s cell phone policy. During the hearing, Hallock described this conversation as follows:

> Q. BY MR. RYAN (continuing) Sharon Bishop told you that you would have 300 any time minutes under that plan that you could use, right?
>
> A. Yes.
>
> Q. And she also told you that, if you went over that 300 limit, you would be responsible for paying for any of the overage?
>
> A. No. I went in there and asked for the amount of minutes. My specifics were the direct connects and the cellular minutes and she gave me the amount, but nothing was ever said about paying for it. . .

Although Hallock testified that “nothing was ever said about paying” for the excess “air time,” in his pretrial affidavit Hallock had stated, “I think Sharon Bishop was the one who told me at the time that I had 300 any time minutes that I could use and *that I would have to pay* if I went over the limit.” (Emphasis added.) This inconsistency increases my doubt about the reliability of Hallock’s testimony. To the extent that this testimony is inconsistent with that of other witnesses, I do not credit it.

The government also relies on the testimony of employee Mike King to support a finding that Respondent implemented a unilateral change in its cell phone policy. King, who began work for Respondent in January 1999, testified that Respondent began providing him cell phone service some time in the fall of 2000 but he did not receive any bill for cell phone service until around January 2003. He further testified that he complained about the bill but then paid it. The records of King’s cell phone use may be summarized as follows:

BILLING DATE	**BILLING PERIOD**	**MINUTES**
August 8, 2001	07/07/01—08/06/01	118:16
September 8, 2001	08/07/01—09/06/01	83:48
October 7, 2001	09/07/01—10/06/01	202:04
November 7, 2001	10/07/01—11/06/01	167:16
December 7, 2001	11/07/01—12/06/01	140:00
January 7, 2002	12/07/01—01/06/02	141:42
February 7, 2002	01/07/02—02/06/02 6/02	152:34
March 8, 2002	02/07/02—03/06/02	227:34
April 7, 2002	03/07/02—04/06/02	122:02
May 7, 2002	04/07/02—05/06/02	126:44
June 8, 2002	05/07/02—06/06/02	No entry (page 3 of this document is missing)
July 8, 2002	06/07/02—07/06/02	181:58
August 8, 2002	07/07/02—08/06/02	224:04
September 12, 2002	08/07/02—09/06/02	255:31
October 10, 2002	09/07/02—10/06/02	196:55
November 11, 2002	10/07/02—11/06/02	290:23
December 11, 2002	11/07/02—12/06/02	77:06
January 11, 2003	12/07/02—01/06/03	75:58

These records establish that King exceeded the 200 “free” minutes during the following months: September 7 to October 6, 2001 (202:04 minutes); February 7 to March 6, 2002 (227:34 minutes); July 7 to August 6, 2002 (224:04 minutes); August 7 to September 6, 2002 (255:31 minutes); and October 7 to November 6, 2002 (290:23 minutes).

Based on King’s testimony, and the absence of contradictory information in the documents which Respondent produced pursuant to subpoena, I find that management did not seek reimbursement from King for excess cell phone usage in any of the months identified above. Therefore, I conclude that, until December 2003, Respondent did not follow the policy it had explained to employees in its December 7, 2001 memo.

King also testified that around January 2003, he received a bill for approximately $70 for cell phone use and that the amount was deducted from a later paycheck. I credit that testimony.

The documents produced by Respondent pursuant to subpoena do not include the bill to which King referred. However, based on King’s credited testimony, I find that he did receive such a bill in about January 2003 and that later, Respondent deducted the amount of the bill from his paycheck.

The subpoenaed telephone records establish that during 2002, a number of other bargaining unit employees frequently exceeded the “free” minutes allowed under Respondent’s announced plan, yet there is no evidence that Respondent billed them or deducted the charges from their paychecks. Therefore, I conclude that Respondent’s established practice until December 2002 was *not* to require reimbursement for use of “air time” beyond the specified limits. Accordingly, I conclude that by billing King in December 2002 for such charges and by deducting the amount later from King’s pay, Respondent made a material, substantial and significant change in the terms and conditions of employment of a member of the bargaining unit.

The General Counsel also cites the testimony of Sean Maser to support this unilateral change allegation raised in complaint paragraph 10. Master was not in the bargaining unit when Respondent withdrew recognition in October 2003 because he had quit 2 months earlier. However, the evidence establishes that before he quit, he was performing bargaining unit work. Maser began work for Respondent in March 2001. During his testimony, Maser wasn’t sure when Respondent began providing him cell phone service:

> Q. And approximately when was this that you received the service?

A. Oh, it had to have been—it's hard to say—fall, summer, 2002, maybe. 2001. I can't—I'm not for sure on the exact time when I got my phone.

However, the records summarized below suggest that Respondent first gave Maser a cell phone in February 2002. It also appears likely that Maser received the cell phone previously assigned to employee Kevin Crow, or at least used the same telephone number previously used by Crow. Respondent's records concerning use of this cell phone may be summarized as follows:

BILLING DATE	BILLING PERIOD	MINUTES
August 8, 2001	07/07/01—08/06/01	No entry
September 8, 2001	08/07/01—09/06/01	No entry
October 7, 2001	09/07/01—10/06/01	No entry
November 7, 2001	10/07/01—11/06/01	No entry
December 7, 2001	11/07/01—12/06/01	No entry
January 7, 2002	12/07/01—01/06/02	No entry
February 7, 2002	01/07/02—02/06/02 6/02	No entry
March 8, 2002	02/07/02—03/06/02	170:22
April 7, 2002	03/07/02—04/06/02	184:50
May 7, 2002	04/07/02—05/06/02	137:00 (same phone number, but listed under Kevin Crow's name)
June 8, 2002	05/07/02—06/06/02	No entry (page 3 of this document is missing)
July 8, 2002	06/07/02—07/06/02	168:00 (same phone number, but listed under Kevin Crow's name)
August 8, 2002	07/07/02—08/06/02	66:04
September 12, 2002	08/07/02—09/06/02	153:36
October 10, 2002	09/07/02—10/06/02	82:34
November 11, 2002	10/07/02—11/06/02	84:06
December 11, 2002	11/07/02—12/06/02	113:42
January 11, 2003	12/07/02—01/06/03	157:36

During the billing periods listed above, the cell phone assigned to Maser never exceeded the 200 "free" minutes allowed each month. Therefore, the records do not shed light on whether Respondent had a practice of "forgiving" the charges for minutes exceeding 200.

Maser testified that he first received a bill for cell phone service around Christmas 2002. This testimony accords with Maser's pretrial affidavit, which also states that the amount of the bill was deducted from a paycheck. Maser's affidavit further states that Respondent made similar deductions from 2 later paychecks.

Although the bills received by Maser were not in the documents which Respondent produced pursuant to subpoena, no evidence contradicts Maser. Accordingly, I find that Respondent first billed Maser for cell phone "air time" in December 2002 and deducted the amount billed from his paycheck.

The telephone records, summarized above, establish that Maser had not used the cell phone enough to exceed the "free" minutes allowed under Respondent's plan, as described in the December 7, 2001 and December 5, 2002 memoranda. In other words, if Respondent had followed the plan it had announced to employees, it would neither have given Maser a bill for cell phone use in December 2002 nor deducted the amount of the bill from his pay. By taking these actions, Respondent made a material, substantial and significant change in Maser's terms and conditions of employment.

Essentially. the evidence establishes two different types of unilateral changes regarding reimbursement for cell phone use. In the case of King, Respondent had not applied the terms of its announced policy before December 2002, but instead forgave or overlooked cell phone use which exceeded that allowed by the announced policy. When Respondent abruptly began enforcing the previously ignored policy, that action changed terms and conditions of employment.

In Maser's case, the change did not involve the new enforcement of a long-dormant policy but rather action at odds with both the announced policy and the actual past practice. Respondent's failure to follow its own stated policy undercuts a possible defense.

Testimony suggests that the administrative employee who had been assigned to apply the announced policy had failed to do so, and, therefore, had been replaced with someone more diligent. Respondent may contend that the previous administrator's laxity did not represent official policy and the resulting failure to enforce the policy did not establish past practice.

However, an employer's actions, not its intentions, determine the terms and conditions of employment. An employer might intend to give every employee a $100 raise, but if the money never appears in the employees' paychecks, it constitutes at best a wish, not a practice.

Moreover, Respondent cannot explain away its action simply by saying that it replaced an inefficient administrator with someone more punctilious. If that were the case, the new, abler administrator would have applied the policy scrupulously to both King and Maser, and therefore would have recognized that Maser had not exceeded the number of "free" minutes which Respondent's stated policy allowed. In other words, if Respondent merely had sought to enforce its announced policy consistently, it would not have sent Maser a bill for an amount he didn't owe.

The evidence falls short of establishing that Respondent abruptly began requiring *all* bargaining unit employees to pay for some of their cell phone "air time," but it is not necessary to show that an alleged unilateral change affected everyone in the unit. With respect to King and Maser, at least, the changes were material, substantial and significant.

Additionally, the record establishes that Respondent made these changes without first notifying and bargaining with the Union. However, before reaching any conclusion concerning the lawfulness of Respondent's conduct, I must consider Respondent's "statute of limitations" defense.

In its answer to the original complaint, Respondent raised the defense that "the allegations concerning the implementation of the cell phone policy are barred by the limitation period provided at Section 10(b) of the Act." Respondent bears the burden of establishing this defense by proving that the alleged violation took place more than six months before the filing of the unfair labor practice charge.

In determining whether this defense is meritorious, the first step must be to identify precisely the conduct which the complaint alleges to be violative. If the allegedly violative act were the *promulgation* of the cell phone reimbursement policy, then the statute of limitations would apply. Respondent first issued its cell phone policy some time before December 7, 2001, which certainly is more than 6 months before January 17, 2003, when the Union filed its initial charge in this proceeding.

However, the complaint alleges that Respondent violated the Act by *implementing* the policy, rather than by promulgating it. In other words, Respondent changed working conditions when it started giving employees bills for cell phone use and then began deducting the billed amounts from the employees' pay. According to the General Counsel, Respondent began taking these actions around December 5, 2002, certainly less than 6 months before the January 17, 2003 charge.

Additionally, I find that Respondent made these changes without first notifying and bargaining with the Union. Therefore, I conclude that Respondent thereby violated Section 8(a)(5) and (1) of the Act.

B. Complaint Paragraph 11 (Discretionary Wage Rates)

Complaint paragraph 11 alleges, in part, that on July 8, 2002, Respondent implemented a discretionary starting wage rate to employee Phillip Moss, and on July 22, 2002, implemented a discretionary starting wage rate to employee Jason Engle. In other words, the government alleges that when it hired these two employees, it began them at wage rates higher than the starting wage rates applied to other new employees.

As stated above, Respondent's answer admits these allegations. However, Respondent asserts that they are barred by the statute of limitations.

1. Respondent's 10(b) defense

These allegations appeared in the original complaint and also in the first and second amended complaints. In its answers to all of the complaints, Respondent has admitted these allegations. Additionally, in its answers to the original and first amended complaints, Respondent raised the defense that these allegations were barred by the statute of limitations inherent in Section 10(b) of the Act.

Respondent did not raise the 10(b) defense in its answer to the second amended complaint. However, Respondent did not thereby waive this defense. To the contrary, it has continued to assert the 10(b) defense at trial and in its posthearing brief.

Section 10(b) of the Act provides, in part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six–month period shall be computed from the day of his discharge." 29 U.S.C. § 160(b). Respondent bears the burden of proving that the actions alleged in complaint paragraph 11 took place more than 6 months before any charge concerning them.

On January 17, 2003, the Union filed the initial charge in Case 7–CA–45823. That charge alleged that "[w]ithin the past six (6) months, the above-named Employer has violated the Act by, inter alia. . .4. Unilaterally setting starting wage rate for newly hired employees, without providing the Union with advance notice and an opportunity to bargain."

This language clearly covers the conduct alleged in complaint paragraph 11. It does not matter that the charge did not identify the employees who received the changed wage rates. The charge provided Respondent with enough information to investigate the allegations and to prepare a defense, and is therefore sufficient to mark the ending date of the 6-month period.

July 8, 2002, the date on which Respondent admittedly implemented a starting wage rate for employee Moss, is more than 6 months before January 17, 2003. Therefore, I conclude that Section 10(b) bars the litigation of this allegation.

However, July 22, 2002, the date on which Respondent implemented a starting wage rate for employee Engle, is less than 6 months before the filing of the January 17, 2003 charge. I conclude that this allegation is not time barred.

Additionally, complaint paragraph 11 alleges more than that Respondent implemented initial starting wage rates for Moss and Engle on July 8 and 22, 2002. It also alleges that "since those dates [Respondent] has given [Moss and Engle] discretionary wage increases." Section 10(b) would not bar the litigation of any wage increase given after July 17, 2002.

2. Engle's starting wage rate

Respondent has admitted that it implemented the discretionary starting wage rate for employee Engle, and also has admitted that this action concerned a mandatory subject of bargaining. Additionally, the record establishes that Respondent did not notify the Union and afford it an opportunity to bargain before implementing a starting wage rate for Engle. The record further establishes that this wage rate ($17.25 per hour) exceeded the starting wage rates of other employees in the bargaining unit (typically between $10 and $11.25 per hour).

In *Washoe Medical Center*, 337 NLRB 101 (2001), the Board held that an employer violated Section 8(a)(5) and (1) of the Act by "continuing to unilaterally set starting wage rates for newly hired employees after the union election, without providing the Union with advance notice and an opportunity to bargain about these wages." Before applying this precedent to the present facts, it may be helpful to examine how the *Washoe Medical Center* principle fits into the overall theory of unilateral change violations.

As a general principle, after a union becomes the exclusive representative of a unit of employees, their employer may not change the existing terms and conditions of employment without first notifying the union and providing a chance to bargain. In other words, such an employer has a duty to "maintain the status quo." However, defining what constitutes the "status quo" is not always simple.

For example, assume that an employer had a longstanding practice of deducting 20 percent of the cost of health insurance from each employee's pay. On a certain day, a union becomes the exclusive collective-bargaining representative. Does the "status quo" consist of the amount each employee paid for health insurance on this date, or does it consist of 20 percent of the health insurance cost for each employee?

In *Post-Tribune Co.*, 337 NLRB 1279 (2002), the Board held that in such a situation, the employer's past practice of deducting 20 percent of the health insurance cost from the employee's pay constituted the "status quo." When the cost of the health insurance went up, the employer deducted more so that the employee continued to pay 20 percent of the cost. Even though this action resulted in a larger deduction and therefore less take-home pay, it was consistent with the employer's past practice and did not amount to a change in the status quo.

It may be argued that a similar principle should apply to the present case. If, in the past, Respondent offered to pay a higher wage to attract a more experienced individual, doesn't this practice of matching the starting wage to the skill level constitute the "status quo"? That reasoning would seem persuasive but for another consideration: The amount of discretion retained by the employer.

The Board does not consider the exercise of discretion to be a binding past practice for a rather obvious reason related to the change which occurs when employees designate a union to be their exclusive representative. When the duty to bargain collectively arises, bilateral negotiation replaces unilateral discretion.

Stated another way, in the absence of a union, an employer typically exercises discretion to set *all* terms and conditions of employment. Such unilateral decisionmaking is the norm before employees select a union. However, to protect the union's right to negotiate concerning all mandatory subjects of bargaining, this norm cannot be allowed to define the "status quo." Indeed, if such unilateral decisionmaking did "set a precedent" to be maintained after a majority of employees selected a union, then the negotiating process would be empty and the employees' choice meaningless.

Therefore, if an employer's previous practice involves a significant amount of discretion, that practice does not continue into the bargaining relationship. Thus, in *Washoe Medical Center*, supra, the Board examined the way a recently organized employer had determined starting wage rates before unionization. It concluded that this process involved the exercise of so much discretion that continuing it would infringe upon the union's right to negotiate. The Board wrote:

> Our dissenting colleague contends that the Respondent's policy and procedure for setting initial wage rates entails the consistent application of uniform standards and, thus, curtails its exercise of discretion. On the contrary, we agree with the judge that the procedure used by the Respondent . . . is in no sense automatic. Rather, it entails the application of a large measure of discretion. The Respondent is unfettered in its comparison of applicants' professional qualifications, experience and specialty certifications and, importantly, the value it assigns to those criteria in rating the new hires relative to other departmental employees. . . . Such judgments are necessarily subjective, as it is unlikely that any two applicants or employees will be precisely comparable. It is this substantial degree of discretion, as well as the unavoidable exercise of such discretion each time the Respondent establishes a wage rate for a new employee, that requires the Respondent to bargain with the Union. [337 NLRB at 202, citing *Oneita Knitting Mills*, 205 NLRB 500 (1973).]

In the present case, the record does not indicate that the Respondent had decided upon starting wage rates by applying a rigid formula based on objective criteria. An important factor appeared to be management's estimate of how much money it would take to entice a particular applicant to accept a job offer. Making such an estimate required the exercise of considerable discretion.

Credible evidence establishes that Respondent did not notify or bargain with the Union before deciding upon the wage rate to be offered Engle, and implementing the decision to offer that wage rate, in July 2002. As Respondent admits, this action concerned a mandatory subject of collective bargaining. Moreover, Engle's starting wage rate was so much higher than that paid to other new employees ($17.25 an hour compared to $10 to $11.25 an hour), implementing it clearly constituted a material, substantial and significant change in terms and conditions of employment.

In sum, implementing Engle's starting wage rate, without first notifying the Union and affording it an opportunity to bargain, constituted an unlawful unilateral change in a condition of employment which was a mandatory subject of bargaining. I recommend that the Board find that Respondent thereby violated Section 8(a)(5) and (1) of the Act. By admitting the allegations in complaint paragraph 11, Respondent also has admitted giving later discretionary wage increases to Moss and Engle. Except for raises granted before July 17, 2002, Section 10(b) does not preclude finding a violation. Therefore, I recommend that the Board find that by granting such wage increases, Respondent violated Section 8(a)(5) and (1) of the Act.

C. Complaint Paragraph 12

Complaint paragraph 12, as amended at hearing, alleges that on several occasions, Respondent gave discretionary wage increases to certain employees. Respondent has admitted these allegations.

More specifically, complaint paragraph 12(a) alleges that about November 2002, a more precise date being presently unknown, Respondent awarded a discretionary wage increase to its employee Mike King. Complaint paragraph 12(b) alleges that about September 6, 2002, Respondent awarded a discretionary wage increase to its employee Nate Sloan. Complaint paragraph 12(c) alleges that on or about September or October

2003, Respondent awarded discretionary wage increases to its employees Sean Wiggers and Evan Timmerman.

1. Respondent's 10(b) defense

Although Respondent has admitted all of these allegations, it has raised the defense that the allegations in complaint paragraphs 12(b) and (c) are barred by the 6-month statute of limitations in Section 10(b) of the Act. It may be helpful to begin the consideration of this issue by listing the employees affected and the dates in table form:

Mike King	"About November 2002"
Nate Sloan	September 6, 2002
Sean Wiggers	September or October 2003
Evan Timmerman	September or October 2003

The Union's January 17, 2003 charge in Case 7–CA–45823 alleges, in part, that "Within the past six (6) months, the above–named Employer has violated the Act by, inter alia. . .2. Unilaterally implementing a pay raise without bargaining with the Union."

Although this charge does not name the recipients of the raises, it fully describes the gravamen of the allegations and provided Respondent enough information to investigate these matters and prepare a defense. Therefore, I conclude that the charge's failure to identify the specific employees affected does not render it invalid.

Both Mike King's November 2002 pay raise and Nate Sloan's September 6, 2002 pay raise occurred less than 6 months before the January 17, 2003 charge. Therefore, I conclude that these allegations are not time barred.

Likewise, Respondent did not give the raises to Wiggers and Timmerman more than 6 months before the filing of the January 17, 2003 charge. Indeed, Respondent implemented these wage increases *after* the Union filed this charge.

2. Certain employees not in bargaining unit

However, for another reason, I conclude that Respondent did not violate the Act by increasing the wage rates earned by Sloan, Timmerman and Wiggers. These employees were never in the bargaining unit.

As discussed above, Sloan began work for Respondent about June 2002 as a shop employee, a position outside the bargaining unit. Management did not assign Sloan any work on a jobsite until August 2003, and this work involved removing a sprinkler system rather than installing one. Clearly, Sloan was not performing any bargaining unit work in September 2002, when Respondent granted the wage increase and was not in the unit at that time.

Respondent hired Timmerman in March 2003 and assigned him to work on "special hazards" systems, a job outside the bargaining unit. Around August 2003, management assigned Timmerman to work on the Jackson Products job, but removing sprinkler systems rather than installing them. After that job, Timmerman did receive some assignments installing sprinklers, but I have concluded that these hours were too few and too infrequent to create a community of interest with bargaining unit employees. Therefore, I further conclude that Timmerman was not a member of the bargaining unit at the time he received the raise in September or October 2003.

For reasons discussed above, I also conclude that Sean Wiggers was not a member of the bargaining unit in September or October 2003. Respondent has no duty to bargain with the Union concerning the wage rates of employees outside the bargaining unit. Therefore, changing the wage rates of Sloan, Timmerman and Wiggers did not violate the Act.

3. Discretionary raises given to bargaining unit employee

Mike King was a member of the bargaining unit when he received the raise in about November 2002. Accordingly, I must consider whether this raise constitutes an unlawful unilateral change.

As discussed above, to establish a violation of Section 8(a)(5), the General Counsel must show that Respondent made a material, substantial and significant change in the terms and conditions of employment of bargaining unit members, and did so without first notifying the exclusive collective-bargaining representative of the contemplated changes and affording that union the opportunity to bargain about them and their effects. Additionally, the change must concern a mandatory subject of bargaining.

Respondent has admitted that the pay raise in question concerns a mandatory subject of bargaining, and I find that it constitutes a material, substantial and significant changes in the terms and conditions of employment. Moreover, at the hearing, Respondent amended its answer to state, "Respondent admits that by its conduct described in Paragraph 12 of the Amended Complaint" it has been "failing and refusing to bargain collectively with the exclusive collective bargaining representative of the unit, in violation of Section 8(a)(1) and (5) of the Act."

Respondent raised the 10(b) defense only with respect to complaint paragraphs 12(b) and (c), and not (a). Even had Respondent raised such a defense with respect to complaint paragraph 12(a), that defense would fail. As discussed above, Respondent implemented King's November 2002 raise less than 6 months before the Union filed the January 17, 2003 charge.

Considering Respondent's admissions together with the record as a whole, I conclude that Respondent's implementation of King's November 2002 wage increase constituted an unlawful unilateral change. I recommend that the Board find that Respondent thereby violated Section 8(a)(5) and (1) of the Act.

D. Complaint Paragraph 13 (Discretionary Vacation Accrual Rates)

Complaint paragraph 13 alleges that Respondent implemented discretionary vacation accrual rates for Phillip Moss on July 8, 2002, and for Jason Engle on July 22, 2002. Respondent has admitted these allegations. However, in Respondent's answer to the original complaint, it raised the defense that the "allegations concerning the starting wage and vacation time granted to Phillip Moss . . . are barred by the limitation period provided at Section 10(b) of the Act."

1. Respondent's 10(b) defense

July 8, 2002, when Respondent implemented the vacation accrual rate for Moss, is more than 6 months before January 17, 2003, when the Union filed the initial unfair labor practice charge. Therefore, I conclude that Section 10(b) bars litigation of this allegation. However, Respondent implemented the vacation accrual policy for Engle on July 22, 2002, which is less than 6 months before January 17, 2003, and Section 10(b) does not bar this allegation.

2. Vacation accrual rate for employee Engle

In its answer, Respondent admitted the allegations in complaint paragraph 15. In accordance with this admission, I find that the vacation accrual rate is a mandatory subject of bargaining.

Respondent's admissions that it implemented a discretionary vacation accrual rate for Engle and that this rate was a mandatory subject of bargaining leave one question unanswered: Was the rate which Respondent set for Engle different from the vacation accrual rates of other employees? To answer that question, I first must ascertain whether Respondent had an established practice regarding the accrual of vacation. Then, I must determine if Respondent followed that practice when it hired Engle.

Respondent's employee handbook states that during the first year of service, employees will earn one-half day of vacation per month, for a total of 6 days per year. It would be surprising if Respondent published this accrual rate in the employee handbook but then disregarded it when setting the actual rates for employees. Presumably, Respondent intended the information in its employee handbook to be the rule, rather than the exception.

Other evidence supports a finding that Respondent typically followed its published policy. Bargaining unit employee, Mike King, credibly testified that he accrued vacation time at this announced rate during his first year of employment. Another bargaining unit employee, Derek Michael, gave similar testimony, which I credit. Based on this testimony and the employee handbook, I conclude that Respondent had an established practice of allowing new employees to accrue 6 days of vacation during the first year of employment.

Did Respondent follow this practice when it hired Engle? Union organizer James Tucker testified that a supervisor, Matt Batchelor, told him that "Jason [Engle] and Phil [Moss] had got vacation already and they have not even been here a year." According to Tucker, Batchelor said that he believed Engle was receiving "one or two weeks" of vacation. I credit this testimony.

Based on a stipulation at hearing, I find that Batchelor is Respondent's supervisor and agent. Therefore, the statements attributed to him by Tucker are not hearsay.

Moreover, Respondent's chief financial officer, Timothy Callahan, testified that he decided to give Engle and Moss 2 weeks of vacation per year because Engles received that much from his previous employer. Crediting this testimony, I find that when Engles began working for Respondent, he accrued two weeks of vacation per year rather than the 6 days ordinarily received by new employees. Further, I conclude that by starting Engle at the higher vacation rate, Respondent made a unilateral change in established terms and conditions of employment. I would reach a similar conclusion with respect to employee Moss, except that Section 10(b) bars litigation of that allegation.

Based upon the testimony of union organizer James Tucker, which I credit, I find that Respondent did not notify the Union or provide it the opportunity to bargain before implementing the vacation accrual rates it set for Moss and Engle.

Increasing the amount of vacation for first-year employees from 6 days to 2 weeks certainly constitutes a material, substantial and significant change in a term of employment which is a mandatory subject of collective bargaining. Because Respondent took this action without first notifying the Union and offering it the opportunity to bargain, I conclude that Respondent violated Section 8(a)(5) and (1) of the Act.

E. Complaint Paragraph 14 (Alleged Unilateral Changes in Surveillance Camera System)

Complaint paragraph 14 alleges that since about May 2003, Respondent has expanded and enhanced its system of surveillance camera operation at its Grand Rapids facility. Respondent denies this allegation.

On June 5, 2002, Respondent agreed to settle a previous unfair labor practice case. This settlement limited how Respondent could use television security cameras on its premises:

> Vanguard Fire & Supply Company and Local 669 agree with respect to surveillance cameras at the Grand Rapids facility as follows:
>
> 1. The Company may maintain its surveillance camera system as it existed as of June 4, 2002, except as follows:
>   a. The camera in the Fab Shop and the one adjacent to Tate Thomas' office shall not operate from 8:00 a.m. until 5:00 p.m. on normal work days (Monday–Friday but not holidays).
>   b. The two cameras in the Shop area (near the Breakroom and the entrance to the Fab Shop) shall not record from 8:00 a.m. to 5:00 p.m. on normal work days (Monday–Friday but not holidays). These cameras, however, may operate during these hours.
> 2. The parties may request bargaining on this topic at any time.

This agreement establishes, in effect, the "status quo" and any departure from it would constitute a change in terms and conditions of employment. Respondent has admitted that the surveillance cameras constitute a mandatory subject of bargaining. It had a duty to notify and bargain with the Union before making any change which affected this status quo in a material, substantial and significant way.

The General Counsel alleges that Respondent made changes in its surveillance camera system some time after this June 5, 2002 settlement. The complaint does not specify exactly what changed. The General Counsel's brief asserts that Respondent made the following changes, but it is not entirely clear which of them the Government considers violative: Respondent (1) installed another camera; (2) replaced analog equipment with digital; (3) updated its system to allow television images to be viewed remotely, over the Internet; (4) used some kind of technology allowing images from 12 different cameras to be displayed at one time; and (5) operated the Fab Shop camera during prohibited hours.

For clarity, before addressing whether Respondent made such changes, I will focus on another document mentioned by the General Counsel which might become a source of confusion. During collective bargaining, Respondent and the Union reached tentative agreement on a contractual provision stating as follows:

> Surveillance Cameras: The Company may maintain the surveillance camera system pursuant to June 5, 2002 Settlement Agreement. The Company shall not make changes that effect [sic] the areas of surveillance or the time of surveillance unless the Company first gives the Union notice of any proposed changes and offers an opportunity to bargain provided;
>
> 1. The Company may make any changes to surveillance of the outside of any of it's [sic] facilities at any time without any obligation to notify or bargain with the union, and
> 2. The Company shall have no obligation to notify or bargain with the Union over any changes to equipment so long as the area and time of surveillance is not effected [sic].

Negotiators for Respondent and the Union initialed this provision on August 21, 2002. However, Respondent and the Union had not completed their negotiations for a collective-bargaining agreement when Respondent withdrew recognition from the Union on August 15, 2003.

Customarily, when labor negotiators initial a particular contract proposal during the course of bargaining, that action does not make the provision, standing alone, a binding contract. Rather, the negotiators only intend their initials to signify a "tentative agreement" which removes the item from further discussion (takes it "off the table") at that time. The initialed language will bind the parties only when they reach agreement on a complete contract which includes that term.

The record in this case does not suggest that during negotiations, the Respondent and Union intended to depart from this well-established custom in collective bargaining. Therefore, I do not consider their action on August 21, 2002, as an agreement to modify, then and there, the terms of the June 5, 2002 settlement agreement, which continued to define the status quo with respect to security cameras.

To establish that the Respondent made a unilateral change in this status quo, the General Counsel relies on the testimony of Henry Kuiper, who had worked for Respondent as a fire alarm technician before being laid off about October 17, 2003. Kuiper testified, in part, as follows:

> Q. Are you aware—or, when, if ever, did the Employer install surveillance cameras, at the Grand Rapids' facility?
>
> A. Well, there always was some surveillance cameras there but I believe that, in the—late 2002 towards Winter, that they upgraded their security system—their surveillance system, I should say.

Kuiper explained that by "upgraded," he meant that management replaced "the old VCR camera and stuff" with all digital equipment mounted on a rack, and added two cameras, one inside the building and one outside. The monitor was located in the "service office," and, Kuiper testified, on one occasion he saw the monitor display an image of pipefitters working in the Fab Shop. Kuiper could not give an exact date, but estimated that this occasion was in about June 2003. Kuiper then testified that he saw other cameras working between the hours of 8 a.m. and 5 p.m., but he did not say in what month, or even in what year, he made such observations.

The General Counsel also elicited from Kuiper some testimony to support the allegation that Respondent had modified its surveillance camera system to make it remotely accessible over the Internet. However, Kuiper's testimony falls short of the necessary proof:

> Q. Approximately, when did you find that out?
>
> A. When I found out that it could be?
>
> Q. Yes.
>
> A. That was, in about July, 2003.
>
> Q. Okay and how did you find out that it could be remotely viewed?
>
> A. I found out, by talking to Jessica Profrock.
>
> Q. Okay and who is Jessica Profrock?
>
> A. She sits in the Service Department office.
>
> Q. Okay and what do you recall being said?
>
> A. I remember asking her, if these cameras could ever be monitored, through the Internet, and she said that she knew, at one time, they could but she was not sure, if it still could be done.

The complaint does not allege Profrock to be a supervisor and the statement attributed to her does not constitute an admission by Respondent. It is hearsay.

Profrock did not testify, but even assuming that Kuiper quoted her correctly and even assuming further that the information she provided Kuiper was accurate, it still does not prove that Respondent "upgraded" its surveillance camera system to make it accessible from remote locations. If anything, Profrock's words can be read to suggest the opposite: At one time the system could be been accessed remotely but she wasn't sure that it presently had that capability.

Moreover, the phrase "at one time" is vague. It might refer to a period *before* the June 5, 2002 settlement, but just as easily it might refer to a time after the settlement.

Based on my observations of the witnesses, I do not credit Kuiper's testimony. Because of my doubts about this testimony, I do not rely upon it at all in determining the facts related to complaint paragraph 14.

Respondent's service manager, Ted Hembroff, also testified about these matters. From Hembroff's demeanor as a witness, I conclude that his testimony is reliable and credit it.

Hembroff explained that Respondent sells security camera systems as well as fire protection systems. There was an occasion in the spring of 2003 when he installed a digital recording system temporarily at Respondent's facility as a learning exercise. This system was more advanced than the system Respondent uses to watch over its own property, and Hembroff wanted to learn how to program the digital system before installing it on the customer's premises and explaining it to the customer's management. Hembroff testified that he briefly attached the digital recording equipment to Respondent's cameras:

> [T]he only purpose for installing it was for a learning curve for me so, when I got out to the customer I did not look like I was learning for the first time. It was put in. It may have been in for a day or two days for the individuals who were going out with me so I could give them training on it. It was taken out and put back up normally. So that was the only time a digital recorder was ever used.

Hembroff also testified that the same day Chief Financial Officer Callahan informed him of the June 5, 2002 settlement, he disconnected the cameras which, under the settlement, could not be operated during working hours:

> I happened to have some programmable timers in the back, pulled them off the shelf, hooked them up so three of the cameras would automatically lose power at eight o'clock, between the hours set, and the fourth one I literally cut the video feed from the camera before it went anywhere during those hours.

Except for changing the timers because of daylight savings time, Hembroff has not altered their settings and is unaware of anyone else changing those settings. Based on Hembroff's demeanor as a witness, I have considerable confidence in the trustworthiness of his testimony, which I credit.

As already discussed, I have rejected Kuiper's testimony as unreliable and do not find that he saw any prohibited images on the monitor. It may be noted that Hembroff's testimony includes an explanation of how Hembroff might have been mistaken about what he saw. Even after a camera is turned off, the last image the camera "saw" remains frozen on the monitor. Kuiper may have seen such a "freeze frame" and mistaken it for a moving image, but whatever the reason, I do not find that Kuiper witnessed any camera taking pictures prohibited by the June 5, 2002 settlement agreement.

Hembroff's testimony that he connected a digital recorder briefly to Respondent's security system—to learn how that equipment operated before delivering it to a customer—does not affect my finding that Respondent did not turn on any camera at prohibited times. Substituting a digital hard disk recorder for an analog tape recorder would not change the fact that the cameras were on automatic timers and therefore not activated. The settlement agreement did not require all cameras to be shut down, so the learning experience could still take place even though certain cameras were not operating.

Even had Respondent permanently replaced its old analog recorder with a digital hard disk recorder—which it did not—this action would not have constituted a material, significant and substantial change. After all, a recorder is a recorder, and no credible evidence establishes that using a different kind of recorder would have an impact on working conditions.

However, even were the substitution of a digital recorder for an analog model considered to be material, substantial and significant, it took place for such a brief period of time that the change had de minimis impact on terms and conditions of employment.

In sum, no credible evidence establishes the allegations raised by complaint paragraph 14. Therefore, I recommend that the Board dismiss these allegations.

F. Complaint Paragraphs 15 and 16

Complaint paragraphs 15 and 16 plead legal conclusions. Respondent has admitted the allegations in paragraph 15, that the subjects set forth in paragraphs 10 through 14 relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purpose of collective bargaining. I so find.

Complaint paragraph 16, which Respondent denies, alleges that Respondent engaged in the conduct described in complaint paragraphs 10 through 14 without first notifying the Union and affording the Union the opportunity to bargain about the changes and their effects. I have already addressed these allegations above.

III. INFORMATION REQUEST ALLEGATIONS

A. Complaint Paragraph 17 (Information Request Admitted)

Complaint paragraph 17 alleges, and Respondent admits, that since about June 19, 2003, the Union has requested that Respondent furnish it with certain information specified in a letter attached to the complaint. Based on Respondent's admission, I so find. This information will be described more fully in connection with complaint paragraphs 18 and 19.

B. Complaint Paragraph 18 (Relevance and Necessity of Requested Information Admitted)

Complaint paragraph 18 alleged that certain specified information (but not all information) requested in the Union's June 19, 2003 letter is necessary for, and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the bargaining unit. Respondent has admitted these allegations.

C. Complaint Paragraph 19 (Alleged Refusal to Provide Information Denied)

Complaint paragraph 19 alleges that since on or about June 27, 2003, Respondent has failed and refused to furnish the Union with this information, Respondent denies this allegation.

1. Overview of the information requested

Complaint paragraph 18 does not describe the requested information in detail but instead refers to numbered paragraphs in the Union's June 19, 2003 letter. When complaint paragraph 19 is read together with the information request, it is clear that the General Counsel is alleging that the information described in the following portions of the Union's June 19, 2003 letter is relevant and necessary:

> [1st series]
>
> 1. [W]hat jobs are going on now and what jobs have been awarded, with their approximate start dates.
>
> [2nd series]

1. A list of all employees who have been hired, showing their race, national origin, sex, sexual preference, age, disability and religion.

. . . .

3. A list of all employees who were promoted, transferred, disciplined or demoted showing their race, national origin, sex, sexual preference, age, disability or religion.
4. A list of all employees who were either denied promotions or transfers showing their race, national origin, sex, sexual preference, age, disability or religion.
5. Copies of all charges or complaints received from any State or Federal administrative agency or any court suit concerning discrimination or harassment based upon race, national origin, sex, sexual preference, age, disability or religion. With respect to any such complaint, charge or lawsuit, please provide not only a copy of the complaint, charge or lawsuit, but a copy of any document showing the resolution or conclusion of that litigation, complaint or charge.
6. A copy of any affirmative action plan which is or has been in existence during the last five years.
7. A copy of any contracts which have any equal employment clauses or guarantees, as well as any contracts which have any affirmative action clauses or guarantees.
8. Copies of any internal investigative reports with respect to any complaints, charges or allegations concerning discrimination or harassment based on race, national origin, sex, sexual preference, age, disability or religion.

. . . .

11. Copies of all sexual harassment, anti–discrimination or discrimination policies.

2. .Requested information about "sexual preference"

The Union requested, among other information, a "list of all employees who have been hired, showing their race, national origin, sex, *sexual preference*, age, disability and *religion*." (Emphasis added.). Presumably, by "sexual preference" the Union meant sexual orientation, and, except when quoting the information request directly, I will use the latter, more exact term.

Clearly, information about the race and national origin of bargaining unit members is presumptively relevant. Indeed, it is not difficult for a union to establish the relevance of such information even concerning employees outside the bargaining unit. See, e.g., *Frito-Lay, Inc.*, 333 NLRB 1296 (2001). Likewise, information about the gender of bargaining unit employees is presumptively relevant.

On the other hand, I am reluctant to conclude that an employer has any duty to furnish, or even collect, information concerning the sexual orientations of its employees. Such a conclusion would implicate serious privacy questions which should be decided only after these issues had been fully litigated.

However, Respondent's answer admits that *all* information alleged to be relevant and necessary is, in fact, relevant and necessary. Technically, therefore, there is no issue before me concerning the relevance of information about sexual orientation, and for the purposes of this case, I could simply assume that to be the case.

Ordinarily, a judge should be reluctant to address an unraised issue, but in this instance I am concerned that an inartfully worded decision might lead to an unintended precedent. Requests for information about the sexual orientations of employees (and to some extent, requests for information about their religious affiliations) intrude on privacy so much that some discussion appears warranted. First, however, I must determine whether the admissions in Respondent's answer preclude me from examining the matter sua sponte.

Complaint paragraph 18, unlike complaint paragraph 17, does not allege facts but instead pleads legal conclusions. Even if all parties in a case agreed to a particular legal conclusion, the Board still retains authority to interpret the Act and to apply it to the facts of the case. For example, even if all parties in a particular case stipulated that a certain individual was not a statutory supervisor, the Board still would have the authority to reach the opposite conclusion if the record established that the person satisfied the 2(11) criteria.

Similarly, the General Counsel and Respondent cannot bind the Board to the conclusion that certain information is relevant and necessary if the facts do not support such a conclusion or if the conclusion would be inconsistent with Board precedent or policy. Therefore, the admission in Respondent's answer does not preclude me, or ultimately the Board, from considering the issue: Is information concerning employees' sexual practices relevant to the Union's representation function and necessary for that purpose?

The Union does not limit this request to information about bargaining unit employees. Clearly, such information concerning individuals outside the bargaining unit is not presumptively relevant and the Union has not demonstrated that such information would either be relevant to its representation function or necessary for that purpose.

Is such information about bargaining unit employees relevant and necessary? If so, does the employee's interest in privacy and confidentiality outweigh the Union's need for the information. The following general principles will guide my analysis of these issues:

(1) Information related directly to the wages, hours, and other terms and conditions of employment, such as pension and medical benefits, of bargaining unit employees represented by a union is presumptively relevant to the union's role as collective–bargaining representative and must be furnished upon request. *International Protective Services, Inc.*, 339 NLRB No. 75 [701] (July 15, 2003).

(2) Where the requested information concerns the wages. hours or working conditions of employees within the bargaining unit cov-

ered by the agreement, this information is presumptively relevant and the employer has the burden of proving lack of relevance. *Ormet Aluminum Mill Product Corp.*, 335 NLRB No. 65 [788] (August 27, 2001).

(3) A broad, discovery–type standard applies in determining relevance of information requests. *Chrysler Corporation*, 331 NLRB No. 174 [1324] (August 25, 2000), citing *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967); *A-Plus Roofing*, 295 NLRB 967, 970 (1989), enfd. 39 F.3d 1410 (9th Cir. 1994); *Westside Community Mental Health Center*, 327 NLRB No. 125, slip op. at 14 [661, 674] (1999).

(4) Where the relevance of requested information has been established, an employer can meet its burden of showing an adequate reason for refusing to supply the information by demonstrating a "legitimate and substantial" concern for employee confidentiality interests which might be compromised by disclosure. *Ormet Aluminum Mill Product Corp.*, above, citing *Detroit Edison v. NLRB*, 440 U.S. 301, 315, 318–320.

(5) When dealing with a union request for relevant information that is asserted to be confidential by the employer, the Board is required under *Detroit Edison v. NLRB*, above, to balance a union's need for the information against any "legitimate and substantial" confidentiality interests established by the employer. *Pennsylvania Power Co.*, 301 NLRB 1104, 1105–1106 (1991).

Applying these principles, I conclude that the information sought is not presumptively relevant even with respect to employees in the bargaining unit. To enjoy a presumption of relevance, the information sought not only must pertain to bargaining unit employees but also must *relate directly* to the wages, hours, and other terms and conditions of employment. Information about sexual orientation does not relate directly to wages, hours, or other terms and conditions of employment.

Similarly, an employee's religious affiliation would not appear to be relevant to wages, hours, and working conditions in most situations. Therefore, I conclude that neither sexual orientation nor religious affiliation is presumptively relevant.

This conclusion does not rule out a finding that such information is relevant, but it does place the burden on the General Counsel to show the relevance. Arguably, there might be circumstances in which information about the sexual orientation of employees did have some relevance to wages, hours, or other conditions of employment. However, the record does not establish such circumstances in this case.

Absent a presumption of relevance, the Union bears the burden of presenting evidence showing how the requested information relates to the Union's performance of its representation duties. In its posthearing brief, the Union states, in part:

> Local 669 explained to Vanguard that it needed the EEO information to, *inter alia*, ensure that the Vanguard would meet the affirmative action requirements that federal law imposed on Local 669's Apprenticeship program, given the Parties' tentative agreement to use Local 669's program.

In a footnote, the Union explained that the United States Department of Labor, Bureau of Apprenticeship Training, requires all apprenticeship programs to comply with the equal employment opportunity rules set forth in 29 CFR, § 30.

However, the cited equal employment opportunity rules do not proscribe discrimination on the basis of sexual orientation. Therefore, the Union's argument is not persuasive, at least with respect to such information.

Although the Union argues that it needs information about sexual orientation because of its apprenticeship program, that argument falls apart on closer examination. The General Counsel introduced into evidence the affirmative action plan adopted by the Union's joint apprenticeship and training committee. That document pledges that the "recruitment, selection, employment, and training of apprentices during their apprenticeship shall be without discrimination because of race, color, religion, national origin, or sex." However, the affirmative action plan makes *no mention* of sexual orientation.

The General Counsel also introduced into evidence the standards which the Union's apprenticeship program submitted to the United States Department of Labor. These standards prohibit discrimination because of "race, color, religion, national origin or sex." The standards make no mention of sexual orientation.

The Union cannot credibly claim that its needs information about sexual orientation so that it may comply with Federal apprenticeship regulations because, as discussed above, the regulations do not address sexual orientation. Therefore, I must reject this argument.

It may also be noted that an apprenticeship program operated by a joint training committee stands alone as a separate entity apart from the employers which may send individuals for training. The apprenticeship plan's relationship to the apprentices is distinct from Respondent's relationship to its employees and is also distinct from the Union's relationship to the members of the bargaining unit.

Therefore, it is not entirely clear whether the Union has requested the sexual orientation information to perform the representation duties it has assumed as the 9(a) representative, or whether it has sought this information to benefit a third party. The Union did claim that it needed the requested information for reasons other than administration of the apprenticeship program. However, the Union has not made those purposes clear. During his testimony, the Union's lead negotiator, Paul Long, explained why the Union sought the information:

> Quite honestly, it was quite a lot of reasons. We needed it for the apprenticeship program. In my experience with this company, I've met with employees on various occasions and there's always concerns that the employees have about what's happening in negotiations, what the company's doing, getting

> away with. It seems to be the perception—fiddle—no—the employees—Let me restate it. The employees believe that the company breaks every law there is.

This explanation falls short of explaining how the Union wishes to use the requested information in collective bargaining, contract administration, grievance processing, or some other representation function. Long did not identify any contemplated use for the requested information about sexual orientation. Therefore, I conclude that the Union has not established that this information is relevant and necessary.

However, even were I to conclude that this information is relevant and necessary, I believe that considerations of personal privacy and confidentiality outweigh the asserted need. A request for information about sexual orientation raises issues different from those inherent in requests for information about race, gender and age. Generally, these latter attributes are outwardly visible and asking about them entails far less invasion of personal privacy than inquiries about sexual practices.

In the present case, I conclude that the Union has not shown a need for information about sexual orientation which would outweigh the employees' interest in keeping such information confidential. Therefore, based on the specific facts of this case, I further conclude that Respondent had no duty to disclose such information.

Should the Board disagree, further analysis of the facts will be necessary to determine whether Respondent satisfied its duty to provide the requested information. Here is that analysis.

Respondent's chief financial officer, Callahan, testified that Respondent does not "track" such information "nor do we ask it anyways." My observations of the witnesses convince me that Callahan testified reliably about the matter to the best of his recollection. Crediting his testimony, I find that Respondent did not collect or keep information concerning the sexual orientations of its employees.

In certain circumstances, an employer may have a duty to obtain—or at least try to obtain—requested information not in its possession. See, e.g., *Garcia Trucking Service,* 342 NLRB No. 75 fn. 1 (2004) (Board ordered the respondent to "make a reasonable effort to secure any unavailable information."). In this case, however, I conclude that Respondent did not have a duty to collect information about employees' sexual practices.

Callahan testified that he explained to Long that "we don't know" about the sexual orientations, religions, or disabilities of employees. According to Callahan, Long responded, "Well, we probably don't need that anyways."

Long emphatically denied telling Callahan that "we probably don't need" the requested information. However, based on my observations of the witnesses, and for the reasons discussed below, I do not credit Long's testimony, which was vague and tended to ramble.

At times, Long sounded a bit too dramatic. This theatrical quality seemed strangely out of keeping with the vagueness of his testimony. Although it isn't uncommon for one witness to be overly emphatic and for another to be underly specific, seldom will a single witness be both. The combination of vagueness and certitude produced a negative synergy which undermined Long's credibility.

On the other hand, as discussed above, I conclude that Callihan's testimony about this matter is reliable. Based on that testimony, I find that Respondent did not possess information concerning the sexual orientations and religious affiliations of its employees. As the Board has stated, "Respondent cannot be expected to provide information that it does not have." *Kathleen's Bakeshop, LLC,* 337 NLRB 1081, 1082 (2002). Accordingly, I conclude that Respondent did not violate the Act by failing to provide such information.

Moreover, under the circumstances of this case, I conclude that Respondent did not have the duty to try to obtain such information.

Crediting Callahan, I find that Long did say, "[W]e probably don't need that anyway." Those words reasonably would lead Respondent to believe that it would not be necessary to take further action to obtain the information. Therefore, I do not find that Respondent had a duty to ask its employees the highly personal questions that obtaining this information would require.

To summarize, I have concluded (1) that the requested information about employees' sexual orientations was not relevant to and necessary for the Union to perform its representation duties; (2) that even assuming such information was relevant and necessary, considerations of personal privacy and confidentiality outweighed the Union's need for this information; (3) Respondent did not possess such information; and (4) Respondent had no duty to obtain it.

3. Other information

a. Information on jobs, present, and future

Item 1, first series, asks Respondent to "advise what jobs are going on now and what jobs have been awarded, with their approximate start dates."

Three witnesses, Callahan, Long, and Tucker, provided testimony concerning this allegation. For the reasons discussed above, I do not have confidence in Long's testimony and do not rely upon it. Based upon my observations of the witnesses, I credit Callahan's testimony rather than Tucker's to the extent that their accounts conflict.

Callahan credibly testified that he gave the Union information about the jobs then underway. Callahan inadvertently failed to mention one of these jobs, but Tucker reminded him.

On cross-examination, the General Counsel sought to impeach this testimony by having Callahan examine a position statement which Respondent submitted during the Region's investigation of the unfair labor practice charge. The General Counsel does not contend that Callahan prepared this document. After reading a paragraph of this letter, Callahan acknowledged that it "does not state that any information was provided."

For several reasons, this attempt to impeach Callahan's testimony was not effective. First, it should be noted that this position letter was not a prior statement of the witness within the meaning of Rule 613 of the Federal Rules of Evidence. The record does not establish either that Callahan signed the document or participated in its preparation.

Second, even if considered an admission of a party opponent, the position statement does not rule out the possibility that Callahan provided the information to the Union orally, as he testified. Callahan testified that this position letter "does not state that any information was provided," but that could simply mean that the position letter was silent on this point. A failure to state that information was provided falls short of being a statement that information was *not* provided.

Third, in cross-examining Callahan, the General Counsel directed the witness's attention to a specific paragraph of the position letter and told him to read the paragraph to himself. The General Counsel then asked Callahan, "[D]oes it indicate *anywhere in that paragraph* that any information was turned over?" (Emphasis added.) Callahan agreed that it did not. However, little can be inferred from the fact that one particular paragraph of a position letter failed to indicate that Respondent furnished the Union with requested information.

Fourth, when the General Counsel asked Callahan to read this paragraph, he stated that "it deals with Item No. 9 of the June 19th letter, a *list of jobs*." (Emphasis added.) However, Callahan did not testify that he gave the Union a written list. Instead, he testified that he furnished the information orally, in a discussion at the bargaining table.

Callahan agreed with the General Counsel that Respondent's position letter does state that, at the June 27, 2003 bargaining session, Respondent "again told the Union that they would not provide *that information* because they didn't believe it was relative to the Union's duty of collective bargaining." (Emphasis added.) However, it is unclear what the General Counsel meant by "that information." Was the General Counsel referring to information about *all* jobs, both present and future, or only to jobs that had been awarded but not yet started? From the present record, there is no way to be sure.

In sum, the position letter does not impeach Callahan's testimony that he told the Union about the jobs then underway but refused to provide information about future projects. Specifically, when questioned by Respondent's counsel, Callahan testified, in part, as follows:

> Q. Did you or I provide the Union information about what jobs had been awarded and their approximate start date?
>
> A. No, we didn't.
>
> Q. And was there any discussion about that?
>
> A. Yes, there was.
>
> Q. And what was that discussion?
>
> A. You had told Paul Long that this wasn't relevant to the purposes of bargaining.
>
> Q. Okay, did I say anything else?
>
> A. That we were not going to provide it, nor had we in the past when they have asked for it.

Based on this admission, and other portions of Callahan's testimony, I find that Respondent did not furnish the Union with the requested information about awarded jobs which were not yet underway. It appears that Respondent withheld this information because of concerns that the Union would picket the new jobsites.

In its answer, Respondent admitted that the information described in complaint paragraph 18—which included information about jobs Respondent had been awarded—was necessary for and relevant to the Union's performance of its duties as exclusive representative. Relying on Respondent's admission, I have concluded that this information is indeed necessary and relevant, and do not consider that issue further.

In view of Respondent's admission, its defense does not rest on a challenge to the relevance and necessity of the information, but rather concerns its fear that the Union would use this information to set up pickets at the contemplated jobsites. Respondent contends that this potential for misuse justified the Respondent's refusal to furnish it the information to the Union.

Organizer Tucker testified that the Union had picketed some of Respondent's jobsites, but denied that the Union sought information about future jobsites so that it could dispatch pickets there. Rather, Tucker stated, the Union wanted the jobsite information so that it could contact the employees.

The record does not reflect where or how often the Union picketed and there is no evidence that the Union's picketing of Respondent's jobsites ever violated Section 8(b)(4) or any other provision of the Act. Respondent has offered no evidence that it held *any* belief—whether well—founded or not—that the Union would use information about future jobsites to plan unlawful activity at those sites.

If Respondent argues that it feared the Union would use the requested jobsite information to plan *lawful* picketing, its argument must fail. When a union engages in lawful primary picketing, it acts within the scope of its duties as the exclusive bargaining representative. Moreover, picketing is a long-established Section 7 right. An employer cannot justify withholding requested information by asserting that the union will use it to engage in protected activity.

Respondent admits the relevance of the requested information and has presented no sufficient justification for withholding in. Therefore, I recommend that the Board find that Respondent violated Section 8(a)(5) and (1).

b. List of employees showing EEO data

Item 1, second series, seeks a "list of all employees who have been hired, showing their race, national origin, sex, sexual preference, age, disability and religion." For the reasons discussed above, I do not find that information regarding sexual orientation relevant to the performance of the Union's duties or necessary for that purpose. However, I conclude that the remainder of the information to be both relevant and necessary. See *Hertz Corp.*, 319 NLRB 597 (1995).

The Union's posthearing brief asserts that Respondent never provided the requested information and cites portions of Long's testimony to support such a finding. However, I do not credit Long's testimony, which was vague and sometimes rambled.

As stated above, my observations of the demeanor of Timothy Callahan, the Respondent's chief financial officer, lead me to credit his testimony. Callahan recalled telling Long, "We basically know they are all white males or white guys—I said 'white guys,' not males, but anyway, and then we—we didn't know their sexual preference or any of those other things, with disability or religion, and Paul said, 'Well, we probably don't need that anyway.'"

The response, that all the bargaining unit members were "white guys," provided the Union with information concerning the race and gender of the relevant employees. Respondent did not specifically identify the national origin of the employees. However, Long did not press the matter.

Under some circumstances, an employer may have an obligation to obtain requested information not in its possession. Even assuming for the purpose of analysis that Respondent would have been obligated to obtain and provide more specific data, *had Long asked*, Long did not ask. To the contrary, his comment that "we probably don't need that anyway" suggests that the Union was satisfied with the information which Respondent already had provided. See, e.g., *AT&T Corp.*, 337 NLRB 689, 691 (2002) (after telephone conversation with union representative, the division manager "could have reasonably concluded that [the union representative] was satisfied with the information provided").

In these circumstances, I recommend that the Board dismiss this allegation.

c. List of employees denied transfers or promotions

In item 4, the Union requested a "list of all employees who were either denied promotions or transfers showing their race, national origin, sex, sexual preference, age, disability or religion."

During bargaining, Callahan told Long that Respondent did not have the requested information. According to Callahan, whom I credit, Long again replied, "[W]e probably don't need that anyway."

Long's use of the qualifier "probably" communicated some uncertainty about the matter. However, the record does not establish that the Union later notified Respondent that it did need the information.

The Union's silence, after telling Respondent, "[W]e probably don't need that anyway," reasonably conveys the message that the Union was satisfied with Respondent's representation that it did not have the requested information. Therefore, I recommend that the Board dismiss this allegation.

d. Copies of charges and complaints

In item 5, the Union sought copies "of all charges or complaints received from any State or Federal administrative agency or any court suit concerning discrimination or harassment based upon race, national origin, sex, sexual preference, age, disability or religion."

Callahan testified that no such charges or complaints had been filed against Respondent. He further testified: "We told them we didn't have any—we didn't have anything."

For two reasons, I conclude that there were no such charges or complaints against Respondent. First, for the reasons discussed above, I found Callahan to be a credible witness who gave reliable testimony.

Second, no evidence contradicts his testimony that there had been no EEO charges or complaints against Respondent. Presumably, it would not have been difficult for either the General Counsel or the Union to obtain copies of such records—if they existed—and place them in evidence. However, neither the General Counsel nor the Union offered any such evidence.

Respondent cannot furnish the Union with documents which do not exist. Therefore, I recommend that the Board dismiss this allegation.

e. Affirmative action plan(s)

In item 6 of the information request, the Union sought a "copy of any affirmative action plan which is or has been in existence during the last five years." Callahan credibly testified that no such documents existed.

Respondent did not have a duty to furnish the Union nonexistent documents. *Kathleen's Bakeshop, LLC*, 337 NLRB 1081, 1082 (2002) ("The Respondent cannot be expected to provide information that it does not have."). Therefore, I recommend that the Board dismiss this allegation.

g. Contracts with EEO clauses

Item 7 of the Union's information request asked for a "copy of any contracts which have any equal employment clauses or guarantees, as well as any contracts which have any affirmative action clauses or guarantees." Callahan testified that Respondent did not have any contracts with such clauses. I credit that testimony.

The record indicates that in all instances in which Respondent did not possess documents requested by the Union, it informed union representatives of this fact. Therefore, Respondent has satisfied its duty under the law. I recommend that the Board dismiss this allegation.

h. Internal investigative reports[1]

Item 8 of the Union's information request sought copies "of any internal investigative reports with respect to any complaints, charges or allegations concerning discrimination or harassment based on race, national origin, sex, sexual preference, age, disability or religion."

Callahan credibly testified that there were no such reports. Therefore, I conclude that Respondent did not refuse or fail to furnish the Union with such information, which did not exist, and recommend that the Board dismiss this allegation.

i. EEO—1 reports

In item 10 of its June 19, 2003 information request, the Union sought copies "of all EEO—1 reports." Callahan testified that he told the Union's lead negotiator, Paul Long, that "I have never heard of an EEO—1 report." Callahan made this statement to Long at the June 27, 2003 bargaining session.

Crediting Callahan's testimony, I conclude that he did not know what an EEO—1 form was, and that Respondent did not

[1] For clarity, it may be noted that item 9 of the Union's June 19, 2003 information request sought copies of internal policies and procedures concerning affirmative action "or discrimination or harassment" with respect to race, national origin, sex, sexual preference, age, disability or religion." However, the complaint does not allege that this information is relevant to the Union's duties as the exclusive representative or necessary for that purpose.

According to Callahan, whom I credit, Respondent informed the Union that any such policies were included in the employee handbook. Therefore, were I to reach this issue, I would conclude that Respondent did not withhold from the Union any existing materials sought in item 9 of its information request.

keep such documents. Respondent's failure to maintain such records may implicate some statute other than the Act. However, the complaint does not ask me to decide whether or not Respondent was in compliance with Title VII of the Civil Rights Act of 1964 or any other law pertaining to discrimination on the basis of race, national origin, sex, religion, or age.

Respondent's failure to fill out EEO—1 forms does not constitute a violation of the Act. Because Respondent did not have such documents, it could not furnish copies to the Union, and its failure to do so does not constitute a refusal to bargain in good faith.

It is important to distinguish between a failure to furnish the EEO—1 forms, and a failure to provide the information appearing on such forms. In other parts of the information request, the Union asked essentially for the same information that would appear on an EEO—1 form and Respondent provided that information, informing the Union that the employees were all "white guys."

The Union has advanced no particular reason why it would need actual EEO—1 forms which, in this instance, do not exist. Therefore, I conclude that Respondent, by furnishing the information orally, satisfied its duty to provide the requested information. See *AT&T Corp.*, supra, 337 NLRB at 691.

IV. ALLEGATIONS PERTAINING TO NEGOTIATIONS

Complaint Paragraph 20 (Conditioning Further Bargaining Upon Union's Submission of an "Agenda")

Complaint paragraph 20 alleges that on about July 16 and August 12, 2003, Respondent, by letters addressed to the Charging Party from its legal counsel, conditioned meeting upon advance written submission by the Charging Party of a detailed agenda and proposals. Based on the admission in Respondent's answer, I find that the General Counsel has proven that Respondent engaged in this conduct.

Complaint paragraph 22 alleges that this conduct violated Section 8(a)(5) and (1) of the Act. Respondent has denied this conclusion. In determining the lawfulness of Respondent's actions, it is helpful to put its July 16 and August 12, 2003 letters in context.

The Union won the representation election in July 2001 and began negotiating with Respondent around October 2001. Initially, the Union rejected a number of Respondent's proposals. However, after bargaining for more than 1-1/2 years without reaching agreement, the Union decided it should reconsider those previously unacceptable proposals.

Union organizer James Tucker sent a July 11, 2003 letter to Respondent's attorney, Timothy J. Ryan. It stated, in part, as follows:

> After many months of bargaining, we realize that you have made some proposals which were unacceptable to the Union, but which now may be acceptable to us. Although we still dislike your proposals, we now indicate that we are willing to accept many of them in principle. This means that there is not an impasse. However, before we finally accept these proposals, we need to do several things.
>
> First, we need to work out all the details of your proposals. Since we haven't indicated before our willingness to accept them in principle, we haven't discussed the details of how they will work, their implementation, relationship to other sections of the contract and so on. We need to get to that task immediately.
>
> Second, we need to work out the remainder of the contract in all of its detail. This means we have to talk about the rest of the contract and work out those sections and issues.
>
> Third, we have some other issues which we have not had the chance to discuss. Some of these relate to and are caused by our willingness to accept some of your proposals, at least in principle. Others are matters which we want to raise independently. We will be raising these issues in the near future.

Tucker's letter went on to list eight matters the Union wished to discuss with Respondent. These included job descriptions for bargaining unit positions, Respondent's attendance policy, work rules, guidelines for discipline, and Respondent's 401(k) plan.

Respondent's attorney, Ryan, replied by the July 16, 2003 letter referred to in complaint paragraph 20. This letter stated, in part:

> As you know your union has been the certified representative of a bargaining unit composed of certain Vanguard employees for approximately two years. During that period we have been regularly meeting and negotiating towards a collective bargaining agreement. Through those negotiations we have reached tentative agreements on 29 separate articles. At our last meeting on June 27, 2003 we provided you a comprehensive proposal which included all of the tentative agreements and proposals on five open items.
>
> In your July 11 letter you have indicated that you are willing to accept our proposals and [sic] principle. I'm not sure what you mean by that.
>
> It appears to me that your letter is evidence of bad faith. Your letter demonstrates the union's intention to avoid agreement by insisting and engaging in endless and redundant discussions. Vanguard is not willing to engage in this process.
>
> However, Vanguard is willing to make one more attempt to meet with you and once again fully and completely answer all questions you have and engage in any discussion you deem necessary in order for you to either accept or reject our proposal. However, for that meeting to be productive, and put an end to the "discussion" so that we can get our contract finalized we will insist that you provide a detailed agenda which will set forth all of the following:
>
> 1. Each and every detail of our proposals which you believe needs to be "worked out."
>
> 2. You claim that there is some "remainder of the contract which we need to work out." On page 2 of your letter you itemize eight new proposals you intend to make. Again, I believe raising new proposals at this late stage is

> evidence of bad faith bargaining. However, if you really intend to raise new issues, please include the specific proposals with your agenda.
>
> 3. You state that there are "some other issues which [you] have not had a chance to discuss." The agenda should include a detailed listing of every other issue that you would like to discuss.
>
> 4. You also indicate that you think you need more information. Please provide us a written request for the items and information you think you need.
>
> So that we may be fully prepared to engage in discussion on every single subject you wish to discuss at the next meeting we will insist on receiving this agenda at least two weeks in advance of that meeting. Thus, if we have not received a detailed agenda and the information requests on or before August 5, 2003, we will cancel the August 19, 2003 meeting and we will not schedule another meeting until we have received these items.

Union organizer Tucker replied with a 4-page letter which discussed various aspects of the Respondent's last proposal and sought clarification of some specific points. The letter also included an agenda describing what the Union wished to address at the next negotiating session.

Respondent's attorney Ryan replied by letter dated August 12, 2003, which is the other letter referred to in complaint paragraph 20. The concluding paragraph of Ryan's letter states:

> In my July 16 letter I made it clear that unless I received a detailed agenda comprised of the four points specified in my letter, we would not be meeting with you on August 19. You have not provided the detailed agenda that I requested. Accordingly, we will not be meeting with you on August 19. We remain willing to meet with you two weeks after we receive an agenda which includes all of the points specified in my July 16 letter.

To summarize, Respondent's July 16, 2003 letter demanded that the Union provide an agenda for the next meeting and threatened to cancel that meeting unless the Union provided this agenda some 14 days in advance. The Union replied with a 4-page letter which discussed Respondent's proposals and included an agenda for the next meeting. In effect, Respondent rebuffed the proffered agenda as not good enough and canceled the next bargaining session.

Section 8(d) of the Act defines the duty to bargain collectively as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder." 29 U.S.C. § 158(d).

Plainly and simply, the law imposes on an employer and a union the duty to meet at reasonable times. Period. Neither an employer nor a union can wiggle out of this duty by insisting on preconditions; legal duties don't work like that.

For example, a citizen cannot condition his payment of income taxes on the Internal Revenue Service designing a more understandable form 1040; someone summoned to jury duty cannot condition attendance on the courtroom chairs having blue cushions, and someone drafted into the army cannot refuse unless he receives a particular type of rifle. Likewise, a party with a duty to bargain collectively cannot lawfully avoid that duty by dreaming up obstacles for the other side to surmount before reaching the meeting place.

To be sure, the duty to bargain collectively does afford the parties some flexibility. The Act does not mandate that an employer and union meet at any specified times, but only requires that they meet at *reasonable* times. In the present case, however, Respondent refused to meet at *any* time unless the Union submitted an agenda, and not just any agenda but some document that met Respondent's unilaterally imposed standards.

Respondent contends that the Union had engaged in stalling tactics and may not have been interested in reaching an agreement. According to Respondent, the Union's conduct at the negotiating table was inconsistent with good-faith bargaining and justified Respondent's setting preconditions. This argument must be rejected for three reasons.

First, the record does not establish that the Union prolonged the negotiations or bargained in bad faith. The record supports the opposite conclusion. Although at first, the Union found some of Respondent's proposals to be unacceptable, its July 11, 2003 letter signaled that it had reconsidered and was ready to make concessions.

Second, Respondent's July 16, 2003 reply suggests that Respondent did not impose the agenda requirement to facilitate bargaining but rather to pressure the Union to accept Respondent's proposal without change. Thus, the letter states in part:

> . . . Vanguard is willing to make one more attempt to meet with you and once again fully and completely answer all questions you have and engage in any discussion you deem necessary *in order for you to either accept or reject our proposal.* [Emphasis added.]

Those words do not indicate any willingness to consider the Union's proposals. To the contrary, they suggest that Respondent wanted to limit further bargaining both as to duration ("one more attempt") and as to the subjects to be discussed ("to accept or reject our proposal"). Moreover, to enforce these unilaterally imposed restrictions, it was insisting upon the Union submitting an agenda.

If Respondent sincerely had believed that some kind of written agenda would make the next bargaining session more productive, it could have drafted one and proposed that the parties follow it. But instead of suggesting the usefulness of an agenda and providing a sample agenda for discussion, Respondent delivered an ultimatum. Thus, its action hardly was consistent with its professed desire to make the bargaining more productive.

Third, the merits of an agenda are irrelevant. Even assuming for analysis that an agenda would benefit the negotiating process, Respondent had no right to insist upon it as a precondition to bargaining. See, e.g., *Riverside Cement Co.*, 305 NLRB 815 (1991) (employer unlawfully insisted on the presence of a Federal mediator as a precondition to bargaining).

Stated another way, a proposal that would require one party to submit an agenda before a negotiating session is a nonmandatory subject of bargaining. One party may not insist to impasse that the other side agree to a proposal concerning a nonmandatory subject. Similarly, a party may not condition further negotiating sessions on the other party's agreement to a proposal concerning a permissive (but not mandatory) subject of bargaining. *Tennessee Construction Co.*, 308 NLRB 763 (1992); *Caribe Staple Co.*, 313 NLRB 877 (1994); *Timkin Co.*, 301 NLRB 610 (1991).

Respondent has admitted engaging in the conduct alleged in complaint paragraph 20. For the reasons discussed above, I recommend that the Board find that Respondent thereby violated Section 8(a)(5) and (1) of the Act.

V. WITHDRAWAL OF RECOGNITION

Complaint Paragraphs 21(a), (b), and (c)

Complaint paragraph 21(a) alleges that on or about October 15, 2003, Respondent, by a letter addressed to the Charging Party from its legal counsel, withdrew recognition from the Charging Party as the exclusive collective-bargaining representative of the unit. Respondent has admitted this allegation and I so find.

Complaint paragraph 21(b) alleges that Respondent engaged in this conduct (withdrawal of recognition) on the basis of an antiunion petition signed by fewer than a majority of employees in the unit. Respondent has denied this allegation.

The record establishes that Respondent did base its withdrawal of recognition on a petition signed by some of its employees, so the issues raised by complaint paragraph 21(b) may be resolved by answering these questions: (A) How many of the petition signers were bargaining unit employees at the time Respondent withdrew recognition? (B) How many employees were in the bargaining unit when Respondent withdrew recognition? (C) Does the answer to A divided by the answer to B exceed one-half?

To answer question A, we must compare the names of the employees who signed the petition with the names of the employees in the bargaining unit.

The petition is in evidence as Respondent's Exhibit 42. After the caption "We Don't Want 669 Representation" it bears the following eight signatures: Sean Wiggers, Evan Timmerman, Jeff McDuffie, Nate Sloan, Austin Aamodt, Derek Michael, Marty Shields, and Lon Staples.

For reasons discussed above under the heading "Complaint Paragraph 9 (Union's 9(a) Status)," I have concluded that on the date Respondent withdrew recognition, the bargaining unit consisted of the following 11 employees: Jason Engle, Kevin Hanes, Mike King, Brandon Lewis, Aaron Maxwell, Jeff McDuffie, Derek Michael, Phil Moss, Marty Shields, Lou Staples, and Greg Zittel.

Therefore, I must disregard the signatures of the following petition signers, because they were not members of the bargaining unit when Respondent withdrew recognition: Sean Wiggers, Evan Timmerman, Nate Sloan, and Austin Aamodt. That leaves the following signers, who were bargaining unit employees: Jeff McDuffie, Derek Michael, Marty Shields, and Lon Staples.

In sum, only 4 of the 11 signers were members of the bargaining unit when Respondent withdrew recognition, and that falls short of a majority. Therefore, I conclude that the Government has proven the allegations in complaint paragraph 21(b).

Complaint paragraph 21(c) alleges that Respondent withdrew recognition from the Union on the basis of a petition that was tainted by Respondent's unremedied unfair labor practices. As the Board stated in *Wire Products Mfg. Corp.*, 326 NLRB 625, 627 (1998), "it is well established that an employer cannot rely on any expression of disaffection by its employees which is attributable to its own unfair labor practices directed at undermining support for the union."

The Government bears the burden of establishing that the employee disaffection is, in fact, attributable to the unfair labor practices. However, to carry this burden, the General Counsel does not have to call employees to testify, in effect, "[Y]es, I changed my mind about the union because of." Instead, the Board, applying an objective standard, determines what effect the specific unfair labor practices *reasonably would have* on employees. See *AT Systems West, Inc.*, 341 NLRB No. 12, slip op. at 4 (2004) ("The Board has held that it is the objective evidence of the commission of unfair labor practices that has the tendency to undermine the Union, and not the subjective state of mind of the employees, that is the relevant inquiry in this regard."). See also *Samaritan Medical Center*, 319 NLRB 392, 396 (1995).

In deciding whether a causal relationship exists between the unfair labor practices and a union's loss of support, the Board considers several evidentiary factors: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the violation, including the possibility of a detrimental or lasting effect on employees; (3) the tendency of the violation to cause employee disaffection; and (4) the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union. *AT Systems West, Inc.*, supra; *Wire Products Mfg. Corp.*, supra, 326 NLRB at 627 fn. 12, citing *Master Slack Corp.*, 271 NLRB 78, 84 (1984).

No date appears on the "We Don't Want 669 Representation" petition. However, Sean Wiggers testified that he circulated it in September or October 2003. Crediting this testimony, I conclude that no person signed the petition before September 2003.

Respondent and the Union had scheduled a bargaining session for August 19, 2003. Respondent unlawfully had insisted that the Union submit an agenda as a precondition to meeting. Although the Union submitted such an agenda, Respondent nonetheless canceled the bargaining session. It notified the Union of the cancellation in a letter dated August 12, 2003.

Thus, Respondent had announced its refusal to meet with the Union almost 3 weeks before September 1, the earliest date on which any employee may have signed the petition. Considering that the bargaining unit had only 11 employees, it would seem very likely that by September 1, every bargaining unit member would know about the August 12 refusal to bargain.

The first factor considered by the Board—the length of time between the unfair labor practice and the withdrawal of recognition—certainly indicates a causal relationship.

The second factor concerns the nature of the violations, including the possibility of a detrimental or lasting effect on employees. Respondent's refusal to meet with the Union had an obviously detrimental impact on the collective-bargaining process, and therefore on bargaining unit employees.

In applying the third criterion, the Board assays the tendency of the violations to cause employee disaffection. In this case, all of the unfair labor practices would tend to make the Union appear ineffectual to the employees. When Respondent ignored the Union and set certain wage and vacation rates unilaterally, it necessarily created the impression that the Union was powerless to prevent the change. Employees reasonably would conclude that a union which is powerless is also useless.

Respondent's penultimate unfair labor practice, refusing to meet with the Union, clearly conveyed the message that the Union lacked the ability to represent the employees effectively at the bargaining table. It would be difficult to imagine an unfair labor practice more likely to cause employee disaffection than an employer's refusal to meet with the union.

The Board's fourth factor is quite similar to the third. It focuses on the effect the unlawful conduct reasonably would have on employees' morale, organizational activities and membership in the union. All of Respondent's unfair labor practices predictably would have a negative impact on morale. Respondent's refusal to meet and negotiate with the Union directly undermined the Union's ability to represent the bargaining unit employees, and reasonably would decrease both the morale of employees and their interest in union membership.

Thus, all four factors point to the same conclusion: Respondent's unfair labor practices were quite likely to diminish employees' support for the Union. Therefore, this unlawful conduct tainted the antiunion petition.

Respondent argues that the employees who signed the petition were not aware of its unfair labor practices. Therefore, Respondent contends, the unfair labor practices could not have tainted the petition. However, the General Counsel does not have to prove that employees actually knew of the unfair labor practices. See *Hearst Corp.*, 281 NLRB 764, 765 (1986) ("[W]e are unwilling to allow the Respondent to enjoy the fruits of its violations by asserting that certain of its employees did not know of its unlawful behavior, but rather shall hold it responsible for the predictable consequences of its misconduct."); see also *Wire Products Mfg. Corp.*, supra, 325 NLRB at 627 fn. 13, citing *Fabric Warehouse*, 294 NLRB 189 (1989).

Moreover, considering the small size of the bargaining unit in this case, and further considering that Respondent's refusal to negotiate affected every employee represented by the Union, it appears inevitable that word of the unfair labor practice would spread quickly throughout the unit.

Additionally, even assuming for analysis that the employees did not know that Respondent was refusing to bargain, the effects of this refusal would still produce discontent. The very absence of any news that negotiations were progressing certainly would increase employee doubts about the Union's ability to effect change in the workplace.

Therefore, I conclude that the government has proven the allegations in complaint paragraph 21(c). Further, I recommend that the Board find that Respondent's withdrawal of recognition from the Union violated Section 8(a)(5) and (1) of the Act, as alleged in complaint paragraph 22.

CONCLUSIONS OF LAW

1. Vanguard Fire & Supply Co., Inc., doing business as Vanguard Fire & Security Systems, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Road Sprinkler Fitters Local Union No. 669, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, the Union has been, as alleged in complaint paragraph 9, the exclusive collective-bargaining representative of the employees in the unit set forth in complaint paragraph 8 and described above.

4. Commencing about December 5, 2002, Respondent implemented a policy requiring unit employees to reimburse Respondent for certain costs of subscribing to Nextel cell phone service. as alleged in complaint paragraph 10, without first notifying the Union and affording it an opportunity to bargain, as alleged in complaint paragraph 16. This action violated Section 8(a)(5) and (1) of the Act, as alleged in complaint paragraph 22.

5. Section 10(b) bars litigation of the allegations in complaint paragraphs 11 and 13 relating to the July 8, 2002 starting wage rate and vacation accrual rate for Phillip Moss, but does not bar litigation of the allegations relating to the July 22, 2002 starting wage rate and vacation accrual rate for Jason Engle.

6. Respondent implemented a discretionary starting wage rate for employee Jason Engle on July 22, 2002, as alleged in complaint paragraph 11, without first notifying the Charging Party and affording it an opportunity to bargain, as alleged in complaint paragraph 16. This action violated Section 8(a)(5) and (1) of the Act, as alleged in complaint paragraph 22.

7. Respondent implemented a discretionary wage increase for employee Mike King in November 2002, as alleged in complaint paragraph 12, without first notifying the Union and affording it an opportunity to bargain, as alleged in complaint paragraph 16. This action violated Section 8(a)(5) and (1) of the Act, as alleged in complaint paragraph 22.

8. Respondent implemented a discretionary vacation accrual rate for employee Jason Engle on July 22, 2002, as alleged in complaint paragraph 13, without first notifying the Union and affording it an opportunity to bargain, as alleged in complaint paragraph 16. This action violated Section 8(a)(5) and (1) of the Act, as alleged in complaint paragraph 22.

9. No credited evidence establishes that since about May 2003, Respondent has expanded and enhanced its system of surveillance cameras at its Grand Rapids facility, as alleged in complaint paragraph 14.

10. Respondent violated Section 8(a)(5) and (1) by failing and refusing to provided requested information requested con-

cerning what jobs had been awarded and their approximate starting dates.

11. Respondent violated Section 8(a)(5) and (1) by refusing to negotiate with the Union unless the Union first complied with its demand for a bargaining agenda.

12. On or about October 15, 2004, Respondent withdrew recognition from the Union, as alleged in complaint paragraph 21(a).

13. Respondent withdrew recognition based upon a petition signed by fewer than a majority of employees in the collective-bargaining unit, as alleged in complaint paragraph 21(b)

14. Respondent withdrew recognition from the Union on the basis of a petition tainted by Respondent's unremedied unfair labor practices, as alleged in complaint paragraph 21(c).

15. Respondent's withdrawal of recognition from the Union violated Section 8(a)(1) and (5) of the Act, as alleged in complaint paragraph 22.

16. Respondent did not violate the Act in any other manner alleged in the complaint.

REMEDY

When an employer unlawfully withdraws recognition from a union, the Board's longstanding and normal practice has been to order the employer to recognize and bargain with the union. In several cases, however, the U.S. Court of Appeals for the District of Columbia Circuit has required that the Board justify, on the facts of each case, the imposition of such an order. See, e.g., *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Bldg. Material v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); and *Exxel/Atmos v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). Therefore, I will address the criteria set forth by the court.

The court has held that an affirmative bargaining order must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' Section7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act.

Section 7 of the Act gives employees the right to form, join, or assist a labor organization, to bargain collectively through representatives of their own choosing, to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any and all such activities.

In this case, the bargaining unit employees had selected the Union in a Board-conducted secret ballot election, resulting in the Union's July 26, 2001 certification as the exclusive bargaining representative. For 1 year after that certification, the Union enjoyed a conclusive presumption that it enjoyed the support of a majority of unit employees. This presumption became rebuttable after the end of the certification year.

When Respondent withdrew recognition about 15 months after certification, the parties had not completed the process of negotiating an initial collective-bargaining agreement. By this time, some bargaining unit employees (but not a majority) had become sufficiently concerned that they signed an antiunion petition.

However, Respondent's serious unfair labor practices contributed to the employees' disaffection. Respondent had made changes without first notifying and bargaining with the Union. These unilateral actions inherently raised doubts about the Union's effectiveness as the employees' representative.

Even more significantly, shortly before employees began signing the antiunion petition, Respondent refused to meet with the Union. This refusal clearly signaled that the Union was ineffective and that collective bargaining was futile.

Respondent's unfair labor practices thus coerced employees in the exercise of their Section 7 rights. That coercion will continue until the Board restores the conditions which existed before Respondent "poisoned the well." Those conditions included Respondent's obligation to recognize and bargain with the Union. Ordering Respondent to satisfy this obligation protects the employees' Section 7 rights by allowing those rights to be exercised in an environment free of unlawful coercion.

Moreover, notwithstanding the coercive effects of Respondent's unfair labor practices, a majority of the bargaining unit employees did not sign the antiunion petition. Ordering Respondent to bargain does not frustrate the will of the majority but rather vindicates it.

Considering how recently the employees expressed their will in the 2001 secret ballot election, making that choice meaningful serves a paramount purpose. Indeed, should an employer be allowed to escape its bargaining obligations by committing unfair labor practices, *all* purposes of the Act would sustain damage. Board elections would be reduced to theater, having some symbolic value, perhaps, but little ability to give employees voice in the workplace. Likewise, permitting an employer to enjoy the fruits of its unlawful conduct would render the Board's unfair labor practice machinery ineffective. The ultimate result would be an increasing resort to self-help and a return to the strife which Congress intended the Act to prevent.

No alternative remedy exists which would restore the status quo ante and undo the harmful effects of Respondent's unlawful conduct. Therefore, I recommend that the Board order Respondent to recognize and bargain with the Union.

The General Counsel does not seek restoration of the status quo ante as the remedy for some of the unilateral change violations. Specifically, the complaint seeks a remedial order which includes the proviso that "nothing in this order shall be deemed to require Respondent to rescind the unilaterally increased wages absent request by the Charging Party."

Clearly, this language refers to the wage increases alleged in complaint paragraphs 11 and 12. Although the proviso does not mention the unilaterally set *starting* wages (but only the increases), the same principle would apply: An order requiring Respondent to rescind the wage increases could itself cause harm to members of the bargaining unit.

The proviso does not mention the unilaterally set vacation accrual rates alleged in complaint paragraph 13. However, a remedy requiring Respondent to rescind those rates likewise would have the potential to harm bargaining unit members. There would be no apparent logic in an order which required Respondent to rescind one unilaterally set benefit, the wage increases, but not to rescind another unilaterally set benefit, the wage increases rate.

Remedies for all three of these unilateral changes must be crafted carefully to minimize the risk of harm to bargaining unit employees. Accordingly, I will apply the proviso language to the remedies for the unilaterally set starting wage rates, the unilaterally set wage increases, and the unilaterally set vacation accrual rates.

In another unlawful unilateral change, Respondent implemented changes in its policy concerning reimbursement for cell phone expenses. Although the telephone records establish that Respondent did make such unilateral changes, the parties have not litigated issues involving which employees suffered losses and the extent of those losses. These issues should be left to the compliance stage.

As discussed above, Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide the Union with requested information concerning jobs which had been awarded. Respondent may well have finished the jobs it had been awarded at the time the Union requested this information, but that does not make the issue moot. Although the specific details may change over time, information concerning Respondent's projects and sites remains relevant, the Union has a continuing need for it, and Respondent must provide it.

Respondent also must post the notice to employees attached to this decision as Appendix A.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended[2]

ORDER

The Respondent, Vanguard Fire & Supply Co., Inc. d/b/a Vanguard Fire & Security Systems, Grand Rapid, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Making material, substantial and significant changes in terms and conditions of employment of our employees in the bargaining unit represented by Road Sprinkler Fitters Local Union No. 669, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO without first notifying that Union and affording it an opportunity to bargain concerning such changes and their effects.

(b) Failing and refusing to furnish the Union with requested information relevant to the Union's duties as exclusive bargaining representative and necessary for that purpose.

(c) Setting preconditions to meeting with the Union as the exclusive representative of the bargaining unit employees.

(d) Canceling meetings with the Union because the Union did not comply with the preconditions Respondent unilaterally imposed.

(e) Withdrawing recognition from the Union on the basis of a petition signed by less than a majority of the bargaining unit employees.

(f) Withdrawing recognition from the Union on the basis of a petition that was tainted by Respondent's unremedied unfair labor practices.

(g) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize the Union as the exclusive bargaining representative of the employees in the bargaining unit certified by the Board on about July 26, 2001, as modified by the June 5, 2002 agreement settling unfair labor practice allegations in Cases 7–CA–44437, 7–CA–44872, and 7–CA–44750.

(b) Meet and bargain with the Union, in accordance with its obligations defined in Section 8(d) of the Act, without setting or insisting upon any preconditions to such meetings.

(c) Furnish the Union with requested information concerning what jobs have been awarded to Respondent and the approximate starting dates of those jobs.

(d) Make whole, with interest, all employees adversely affected by the unlawful unilateral changes Respondent implemented in its cell phone policy.

(e) If and only if requested by the Union, rescind the wage and vacation accrual rates which Respondent implemented unilaterally, as described herein.

(f) Within 14 days after service by the Region, post at its facilities in Grand Rapids, Michigan, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 22, 2002.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps that the Respondent has taken to comply.

Dated Washington, D.C. September 30, 2004

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the Act.

WE WILL NOT make material, substantial, and significant changes in terms and conditions of employment of our employees in the bargaining unit represented the Union, by Road Sprinkler Fitters Local Union No. 669, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO without first notifying that Union and affording it an opportunity to bargain concerning such changes and their effects.

WE WILL NOT fail or refuse to furnish the Union with requested information relevant to the Union's duties as exclusive bargaining representative and necessary for that purpose.

WE WILL NOT set preconditions to meeting and negotiating with the Union or cancel meetings because the Union did not agree to such preconditions.

WE WILL NOT withdraw recognition from the Union, as the exclusive bargaining representative of a unit of our employees, based upon a petition signed by less than a majority of bargaining unit members.

WE WILL NOT withdraw recognition from the Union on the basis of a petition that was tainted by our unremedied unfair labor practices.

WE WILL NOT, in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the unlawful change in cell phone reimbursement policy which we made without first notifying the Union and giving it the opportunity to bargain, and WE WILL make whole, with interest, all bargaining unit employees who suffered losses because of our unlawful unilateral change in this cell phone reimbursement policy.

WE WILL, but only upon request by the Union, rescind the wage rates, vacation accrual rates, and wage increases we conferred on certain bargaining unit employees without first notifying the Union and giving it the opportunity to bargain about such matters.

WE WILL recognize the Union as the exclusive representative of our employees in the unit described in the July 26, 2001 Certification of Representative, as clarified by our June 5, 2002 agreement settling unfair labor practice allegations in Cases 7–CA–44437, 7–CA–44872, and 7–CA–44750.

WE WILL furnish the Union with the relevant and necessary information it has requested.

WE WILL, on request, bargain in good faith with the Union regarding the wages, hours, and other terms and conditions of employment of bargaining unit employees.

VANGUARD FIRE & SUPPLY CO., INC. D/B/A
VANGUARD FIRE & SECURITY SYSTEMS